111-624

SUPREME COURT U.S.
FILED
APR 1884
JAMES H. McKENNEY, Clerk.

INTERSTATE EXTRADITION

The jurisdiction of the courts of the United States is exclusive.

BRIEF AND ARGUMENT OF PLAINTIFF.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 1258.

W. L. ROBB, PLAINTIFF IN ERROR.

vs.

P. CONNOLLY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

H. G. SIEBERST, Attorney for Plaintiff in Error.
ALFRED CLARKE of Counsel.

A. C. SEARLE, Attorney for Defendant in Error.
E. C. MARSHALL, Attorney-General of California of Counsel.

Address of Counsel, Old City Hall, San Francisco, Cal.

Donovan & Shahan, Law Printers, 521 Clay St., San Francisco, Cal.

IN THE SUPREME COURT OF THE UNITED STATES.

W. L. ROBB, PLAINTIFF IN ERROR,
vs.
P. CONNOLLY, DEFENDANT IN ERROR. } No. 1258.

OCTOBER TERM, 1883.

In Error to the Supreme Court of California.

TRANSCRIPT FILED FEB. 19, 1884.

H. G. SIEBERST, Attorney for Plaintiff in Error.
ALFRED CLARKE, of Counsel.

A. C. SEARLE, Attorney for Defendant in Error.
E. C. MARSHALL, Attorney-General of California of Counsel.

Address of Counsel, Old City Hall, San Francisco, Cal.

BRIEF AND ARGUMENT FOR PLAINTIFF,

FILED, APRIL 1884.

IN THE SUPREME COURT OF THE UNITED STATES.

W. L. ROBB, PLAINTIFF IN ERROR,
vs.
P. CONNOLLY, DEFENDANT IN ERROR. } No. 1258.

OCTOBER TERM, 1883.

In Error to the Supreme Court of California.

TRANSCRIPT FILED FEB. 19, 1884.

H. G. SIEBERST, Attorney for Plaintiff in Error.
ALFRED CLARKE, of Counsel.

A. C. SEARLE, Attorney for Defendant in Error.
E. C. MARSHALL, Attorney-General of California of Counsel.

Address of Counsel, Old City Hall, San Francisco, Cal.

BRIEF AND ARGUMENT FOR PLAINTIFF,

FILED APRIL 1884.

CONTENTS.

PAGE.

Stipulation submitting the case 4
Synthetical—Index 1–4
Brief statement of facts 5–6
Assignment of errors 6–7
Statement of law, constitutional and statutory 7–10
Constitution U. S.—Preamble— 7
Art. 1, § 8, ¶ 18 7
Art. 3, § 2 8
Art. 4, § 2 8
Art. 6, § 2 8
Revised statutes U. S., §§ 5278, 5279 8
Extract penal code of California, § 1548 to 1557 8–9
Preliminary thesis 10
Plaintiff's points 10
Authorities supporting point ONE 10–51

A. D.

1814—Re Willard and wife, Sergt. const. law, 395 11
1820—Houston v. Moore, 5 Wheat. 1, 21, 22 11
1822—Com. v. Green, 17 Mass. 547 11
1832—Re Clark, 9 Wendell, 218 11–14
1840..State v. Allen, 2 Humph. (Tenn.) 258 14
1842—Prigg v. Comm. Penn., 16 Peters, 614, 624 18
1842—Re Smith, 3 McLean, 121 20–21
1846—State of Delaware v. Buzine, 4 Harr. 575 21
1846—State v. Schlemn, 4 Harr. 571 21–22
1852—Re Fetter, 3 Zab. 311 22–23
1853—Johnston v. Riley, 13 Ga. 133 23–24
1855—Re Manchester, 5 Cal. 237 24
1839—Opinion W. H. Seward, 2 Seward's works, 452 24
1856—Botts v. Williams, 17 B. Mon. Ky. 689 24
1858—Re Edwards et al., 12th Dist. Ct., San Francisco, March 25. 24
1858—Re Greenough, 31 Vt. 286 24–25
1160—Kentucky v. Dennison, 24 How. 104 25–26
1863—Re Romaine, 23 Cal. 582 26–27
1866—Re Donahue, 15th Dist. Ct., San Francisco, Oct. 24 27
1867—Re Hughes, Phil., N. C. 57 27
1866—Re Voorhees, 3 Vroom. 141 27–31
1872—Taylor v. Taintor, 16 Wall. 366 31

1873—Re Brown, 112 Mass. 409 31-33
1874—Re Jones, 4th Dist. Ct., San Francisco, June 7 33
1874—People v. Brady, 56 N. Y. 152 33
1874—Morton v. Skinner, 48 Ind. 123 33-34
1875—Re Hibler, 43 Texas, 197 34-35
1875—Re White, 49 Cal. 435 35
1875—Re Cubreth, 49 Cal. 437 35
1876—Re Titus, 8 Ben. U. S. 413 35-39
1876—Re Rosenblat, 51 Cal. 287 39
1876—Re Briscoe, 51 How. Pr. 422 39-42
1877—Work v. Corrington, 34 Ohio, 78 42
1877—Re Davis, 122 Mass. 324 42-44
1879—Re Bull, Nebrask. U. S. Dist. Ct., 23 Int. Rev. Rec. 80 .. 44-48
1879—Re Leary, U. S. Dist. Ct., 6 Abbott's new cases, 63 48-49
1879—People v. Pinkerton, 77 N. Y. 245 49
1880—Re Hoyle, 1 Crim. Law Mag. 472 49-51
1881—People v. Donahue, 84 N. Y. 442 51
In support of point two 51-89
1807—State v. Plime, T. U. P. Chart, Ga. 142 51-52
1809—Re Roberts, 2 Hall's Law Journal, Md. 192 52
1812—Re Ferguson, 9 Johns. 239 52-53
1816—Re Rhodes, 2 Wheeler's Crim. Cases, 567 53
1819—Re Wright, 5 Sergt. & Rawle, 64 54
1839—State v. McBride, Rice, 400 54-55
1850—Norris v. Newton, 5 McLean, 93 55-56
1851—Charge by Justice Nelson, 1 Blatch. 635 56
1852—Moore v. People, 14 How. U. S. 13 56
1852—Sims' case, 7 Cushing's Rep. 285 56-59
1853—Re Jenkins, 2 Wallace, Jr. 529 59-60
1856—Re Robinson, 1 Bond's Rep. 44 60
1856—Re Sifford, 5 Am. Law Reg. 660 60-63
1858—Ableman v. Booth, 21 How. 515 63-65
1861—Re Kelly, 37 Alabama, 476 65-67
1861—Re McDonald, 9 Am. Law Reg. 664 66
1862—State v. Zulich, 5 Dutch. 413 67
1863—Re Spangler, 11 Mich. 305 67
1863—Re Shirk, 3 Grant's cases, 460 71
1867—Re Farrand, 1 Abbott's U. S. R. 142 72
1867—Re Roberts, 2 Abbott's U. S. Rep. 279 73
1869—Re Hill, 5 Helm's Nev. R. 159 73
1871—Re Neill, 8 Blatchford, 164 74
1871—Re Tarble, 13 Wallace's Rep. 401 76
1879—Re Leary, 7 Abbott's new cases, 47 76–78
1884—Re Robb, 1 West Coast Reporter, 439 79–91
Argument for plaintiff 92-111

Sections 362-364 of penal code....92
Warrant for arrest of Robb....92
Review of plaintiff's authorities....93-106
Point one....93-100
Point two....100-106
Review of California supreme court authorities....106
Review of defendant's brief....107
Opinion of Chancellor Kent, A. D. 1826....108
The assignment of errors examined....108
Conclusion....110-111
Admission of service of this brief by the Hon. A. C. Searle, attorney for the defendent in error, and the Attorney General of California, the Hon. E. C. Marshall....111

[Title Court and Cause.]

STIPULATED,

That this action is hereby submitted for decision without oral argument on the printed briefs which have been prepared by both parties and forwarded for filing. And further stipulated, the Honorable the Attorney General of the United States be requested to move the court to advance the case on the calendar and submit the case for decision on the aforesaid briefs at the earliest possible day.

H. G. SIEBERST,
Attorney for Plaintiff in Error.

ALFRED CLARKE, of counsel.

A. C. SEARLE,
Attorney for the Defendant in Error.

E. C. MARSHALL,
Att'y Gen'l of the State of California, of counsel.

NOTE.—A. E. Shattuck is a deputy of the secretary of state of California and not deputy governor. His name is printed by mistake on pages 4-7-9 and 11 of the transcript under the signature of governor Stoneman. It should be under the name of the secretary of state.

ROBB
vs.
CONNOLLY.

BRIEF FOR PLAINTIFF.

Statement.

The plaintiff is an agent appointed by the governor of Oregon, under sec. 5279 R. S. U. S., to convey C. H. Bayley from the state of California to Oregon, said Bayley being a fugitive from justice from Oregon, demanded and surrendered as such under sec. 5278 R. S. U. S. While in the discharge of this duty the plaintiff was served with a writ of habeas corpus issued by the superior court of San Francisco, on petition of said Bayley, commanding the plaintiff to produce said Bayley, with the time and cause of his detention, before said superior court. Said writ was issued on a petition which expressly stated that Bayley was held as fugitive from justice under the constitution and laws of the United States. The plaintiff, on the 21st day of November, 1883, returned said writ with the copies of his appointment as agent by the governor of Oregon and the extradition mandate of the governor of California, and produced the originals under the seals of the respective states, for the inspection of the court, and respectfully informed the court, by his verified return, that he held Bayley under the authority of the United States and refused to produce him on the ground that the superior court had no power or authority to proceed further in the premises. Thereupon the said superior court committed the plaintiff to the custody of the sheriff, who is the defendant in this action, for an alleged contempt of its authority in refusing to produce said Bayley as commanded by said writ. The plaintiff thereupon applied to the supreme court of the state of California for a writ of habeas corpus for his own release. The writ was granted and served upon the defendant herein, who made his return to the court that he, as sheriff, held plaintiff under the commitment of the superior court for the contempt, hereinbefore stated.

The supreme court of California rendered its decision January 10, 1884, remanding plaintiff to the custody of the defendant herein. A petition for rehearing was filed in said supreme court January 21st, and denied by the court January 26, 1884. Having exhausted his remedies in the supreme court of California the plaintiff prosecutes this writ of error to reverse the decision of the said supreme court.

The plaintiff claims that he was peaceably engaged in executing the laws of the United States when, on the 21st day of November, 1883, at San Francisco, California, he was interfered with by the defendant herein acting as sheriff. That under color of authority from the state of California, the defendant prevented the plaintiff from executing the laws of the United States, and that the imprisonment of the plaintiff by the defendant, and the remand of the plaintiff by the supreme court of California, have been and are contrary to the laws of the United States.

Plaintiff claims: (*a*) That on the petition presented by Bayley to

the superior court that court had no jurisdiction to issue the writ of habeas corpus commanding plaintiff to produce said Bayley, because said petition showed upon its face that plaintiff held said Bayley under the authority of the United States. (*b*) That when plaintiff made a full return to said writ with copies of his commission from the governor of Oregon and mandate of the governor of California, and produced the originals under seals of said states, the superior court was judicially informed, both by the petition and return, that plaintiff held Bayley under the authority of the United States, and had no power to commit plaintiff for not producing said Bayley in said case. (*c*) That the supreme court of California erred in holding: "Neither is it incumbent on us to decide whether Bailey is "held under the authority of the United States, and if so, how far "it is competent for the court below to inquire into the legality of "the proceedings under which he is held. Whether an affidavit or "indictment must accompany the requisition or not; whether the "recitals in the governor's warrant of arrest are conclusive or simply "*prima facie* evidence of the facts they recite. All these are mat-"ters for the consideration of the court issuing the writ and before "whom the prisoner is to be brought. The only inquiry in this "case relates to the power of the court below to compel *the produc-"tion of the body* of the prisoner before it, so that the cause of his "imprisonment and detention be inquired into, and on this point we "have no doubt.

"It was not the duty of the court issuing the writ, nor was it "obliged to accept as true, the return of the party. It was within "the jurisdiction of the court, at least, to inquire into the facts of "the case and the alleged cause of detention, and to this end it was "proper that the prisoner should be brought into the presence of the "court, in obedience to the command of the writ, whereupon the "prisoner would have a right to traverse the return. (People ex rel. "v. Donohoe, 84 N. Y. 438: People v. Brady, 56 id. 182; Norris v. "Newton, 5 McLean, 99; State v. Schlemn, 4 Harr. (Del.) 577. "This the petitioner refused to do, and by such refusal was guilty of "a contempt of court.

"Writ dismissed and prisoner remanded."

Assignment of Errors.

Plaintiff assigns the following errors in the above decision:

1. That it *was* the duty of the supreme court "to decide whether "Bayley was held under the authority of the United States."

2. "All these" (the matters referred to in the context) "are for "the consideration of the court issuing the writ and before whom the "prisoner is to be brought."

This, the plaintiff claims is error, because if the superior court had not jurisdiction it cannot be true that it was the duty of the plaintiff to produce the prisoner before it.

3. "The only inquiry in this case relates to the power of the "court below to compel the production of the body of the prisoner

" before it, so that the cause of his imprisonment and detention can " be inquired into, and on this point we have no doubt."

The plaintiff claims that this is error, in so far as it implies that it was the duty of plaintiff to produce Bayley. Plaintiff claims that it was the duty of the supreme court to examine the power of the superior court to compel the production of Bayley, and that on the undisputed facts, the facts verified by Bayley as well as by this plaintiff, the superior court had no power in the premises, and the supreme court should have so found

4. " It was not the duty of the court issuing this writ, nor was it " obliged to accept as true the return of the parties."

Plaintiff claims that this is error as applied to this case, because there was no dispute as to the truth of the return. The petition proved the return to be true.

5. " It was within the jurisdiction of the court at least to inquire " into the facts of the case and the alleged cause of detention."

Plaintiff claims that this is error, and that by the petition, and by the petition and return the court was judicially informed that plaintiff held Bayley under the authority of the United States.

6. " To this end it was proper that the prisoner should be brought " into the presence of the court in obedience to the command of the " writ, whereupon the prisoner would have had the right to traverse " the return." (Citing cases.)

Plaintiff claims that this is error, as it would amount to a surrender by him of his prisoner to a court having no power over the case.

7. " This the petitioner refused to do, and by such a refusal was " guilty of a contempt of court."

Plaintiff claims that this is error, because by executing in a lawful manner the authority of the United States he could not be guilty of contempt of any state court.

8. " Writ dismissed and prisoner remanded "

Plaintiff claims that this is error, and that the judgment should have been for the discharge of plaintiff.

THE FACTS, as stated in the transcript and briefly referred to herein, are admitted by the defendant to be true.

Statement of Law.

" We, the People of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

" The congress shall have power * * to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof." Art. 1, sec. 8, ¶ 18, Const. U. S.

"The judicial power of the United States shall extend to all cases

in law and equity arising under this constitution the laws of the United States," etc. Const. U. S., art. 3, sec. 2.

"The jurisdiction of the U. S courts in the first three classes of cases in the above section is exclusive." State v. McBride, Rice 400.

"A person charged in any state with treason, felony or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from whence he fled, be delivered up, to be removed to the state having jurisdiction of the crime." U. S. Const., art. 4, sec. 2.

"This provision is in the nature of treaty stipulation between the states, and equally binding on each and all the officers thereof even in the absence of congressional legislation." Ex parte Hebler, 43 Texas, 197.

"The constitution and laws of the U. S shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." Const. U. S., art. 6, sec. 2.

"All * * judicial officers * * of the several states shall be bound by oath or affirmation to support this constitution." Art. 6, § 2, ¶ 3.

Section 5278 revised statutes of the United States:

"Whenever the executive authority of any state or territory demands any person as a fugitive from justice of the executive authority of any state or territory to which such person has fled, and shall produce a copy of the indictment found, or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony or any other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and cause notice of the arrest to ge given to the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear; if no such agent shall appear within six months from the time of the arrest, the prisoner may be discharged. And all costs and expenses incurred in the apprehending, securing and transmitting such fugitive to the state or territory making such demand shall be paid by such state or territory.

"5279. Any agent so appointed who shall receive the fugitive into his custody, shall be empowered to transport him to the state or territory from which he has fled; and every person who by force sets at liberty or rescues the fugitive from such agent while so transporting him, shall be fined not more than five hundred dollars or be imprisoned more than one year."

[EXTRACT FROM PENAL CODE OF CALIFORNIA.]

"1548. Any person charged in any state of the United States with treason, felony, or other crime, who flees from justice and is found in this state, must, on demand of the executive authority of

the state from which he fled, be delivered up by the governor of this state, to be removed to the state having jurisdiction of the crime.

"1549. A magistrate may issue a warrant for the apprehension of a person so charged, who flees from justice and is found in this state.

"1550. The proceedings for the arrest and commitment of a person charged, are, in all respects, similar to those provided in this code for the arrest and commitment of a person charged with public offense committed in this state, except that an exemplified copy of an indictment is found, or other judicial proceedings had against him in the state in which he is charged to have committed the offense, may be received as evidence before the magistrate.

"1551. If, from the examination, it appear that the accused has committed the crime alleged, the magistrate, by warrant reciting the accusation, must commit him to the proper custody of his county, for such time, to be specified in the warrant, as the magistrate may deem reasonable to enable the arrest of the fugitive under the warrant of the executive of this state, on the requisition of the executive authority of the state in which he committed the offense, unless he be legelly discharged.

"1552. The magistrate may admit the person arrested to bail by an undertaking with sufficient securities, and in such sum as he deems proper for his appearance before him at a time specified in the undertaking, and for his surrender to arrest upon the warrant of the governer of this state.

"1553. Immediately upon the arrest of the person charged, the magistrate must give notice thereof to the district attorney of the county.

"1554. The district attorney must immediately thereafter give notice to the executive authority of the state, or the prosecuting attorney, or presiding judge of the court of the city or county within the state having jurisdiction of the offense, to the end that a demand may be made for the arrest and surrender of the person charged.

"1555. The person arrested must be discharged from custody or bail, unless before the expiration of the time designated in the warrant or undertaking he ss arrested under the warrant of the governor of this state.

"1556. The magistrate must return his proceedings to the superior court of the county, which must thereupon inquire into the cause of the arrest and detention of the person charged; and if he is in custody and the time of his arrest has not elapsed, it may discharge him from detention, or may order his undertaking of bail to be canceled, or may continue his detention for a longer time, or re-admit him to bail to appear and surrender himself within a time specified in the undertaking. (Amendment of April 12, 1880.)

"1557. When the governor of this state, in the exercise of the authority conferred by section 2, article 4, of the constitution of the United States, or by the laws of this state, demands from the executive authority of any state of the United States, or of any foreign government, the surrender to the authorities of this state of a fugitive from justice, who has been found and arrested in such state or

foreign government, the accounts of the person employed by him to bring back such fugitive must be audited by the board of examiners and paid into the state treasury."

Preliminary Thesis.

In inter-state extradition the proceedings in anticipation of the executive demand are govered by our penal code, sections 1548 to 1558, hereinbefore cited

The executive demand, and all the proceedings thereunder or thereafter, are not under the state law, but are under the act of congress.

When the proceedings derive their authority from the act of congress, it is not in the power of the state, by legislative or judicial action to defeat or oppose the operation of the national law.

In the case at bar we are not operating under state law, but are operating under the authority of the United States, viz: sec. 2 of art. 4, Const. U. S., and sec. 5278 R. S. U. S., hereinbefore cited.

PLAINTIFF'S POINTS.

The plaintiff maintains:

I.

That in the case at bar plaintiff was and is acting under the authority and executing the power of the United States.

II.

That the superior court had and has no jurisdiction, power or authority to compel plaintiff to produce his prisoner, or to commit plaintiff for refusing to produce him, and that the decision of the supreme court remanding the plaintiff is manifest error.

In support of point ONE, plaintiff urges that the matter of inter-state extradition is a matter of national concern provided for by art. 4, sec. 2, U. S. Const., and regulated by sec. 5278 R. S. U. S., hereinbefore cited.

That in the following cases the courts recognized the rule that the constitution and laws of the United States were the test by which proceedings in extradition ought to be determined, and thereby demonstrated that such proceedings derived their authority from the constitution and laws of the United States.

"It has been held in South Carolina that the demanding, apprehending and conveying away of fugitives from justice, under the provisions of the constitution and laws, are ministerial acts, wholly intrusted to the management and discretion of the executive authority.

That the making the demand, the transmission of the documents, the mode of their authentication, their validity and legal operation, are exclusively of executive cognizance, and that the judicial authority of the state to which they are sent has no control or jurisdiction over the subject. When, therefore, certain persons were brought up before a judge of that state by habeas corpus who were under arrest by order of the executive of South Carolina, for the purpose of being delivered to an agent of the executive of New York, who had demanded them as fugitives from justice in that state, bills of indictment being found against them in New York for bigamy. Their discharge was moved for on various grounds, but the judge decided that he had no power or authority to discharge the prisoners, or in any way whatever interfere with the mandate of the executive, and that it must be a case excepted and out of the state habeas corpus act by the operation of the constitution and laws of the United States." (Willard and wife v. the State of New York, by Judge Ray, South Carolina, July 14, 1814. Sergeant's constitutional law, p. 395.)

"That where congress have exercised a power over a particular subject given them by the constitution, it is not competent for state legislation to add to the provision upon that subject, for that the will of congress upon the whole subject is as clearly established by what it had not declared as by what it had not expressed.

"It is clear that in the opinion of congress" a (certain) "saving clause was necessary in order to authorize the exercise of concurrent jurisdiction by the state courts." * * "The state could not exercise concurrent jurisdiction without coming into direct collision with the laws of congress." * * "The jurisdiction was exclusively vested in the national courts, * * and could not be exercised by the state courts" (Houston v. Moore, 5 Wheaton, 27, A. D. 1820.)

"The constitution has made that obligatory between the states which between nations entirely foreign to each other was done from comity, viz: the delivery up of criminals who have fled from justice." (Com v. Green, 17 Mass. 547, A. D. 1822.)

* * * "But under our federal government, this matter has been regulated, and we are not left to the uncertainty arising from an inquiry of one state into the particulars of an offence committed in another. The constitution of the United States provides that 'A person charged in any state with treason, felony or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime.' Here then is the law on the subject—a positive regulation and tantamount to a treaty stipulation; and we are not to resort to the comity of nations for our guidance. Every person who is *charged* with an offence in any state and shall flee to another state, shall be delivered up It is not necessary to be shewn that such person is guilty; it is not necessary, as under the comity of nations, to examine into the facts alleged against him constituting the crime; it is sufficient that he is *charged* with having committed a crime.

"But *how charged?* The law of congress has answered this ques-

tion as follows: 'Whenever the executive authority of any state in the union, or of either of the territories, shall demand any person as a fugitive from justice, of the executive authority of any state or territory to which such person shall have fled, and shall moreover produce the copy of an indictment found, or an affidavit made before a magistrate of any state or territory as aforesaid, charging the person so demanded with having committed treason, felony or other crime, certified as authentic by the governor or chief magistrate of the state or territory from which the person so charged fled, it shall be the duty of the executive authority of the state or territory to which such person shall have fled, to cause him or her to be arrested and secured.' In order, therefore, to give the governor of this state jurisdiction in such a case, three things are requisite. 1. The fugitive must be demanded by the executive of the state from which he fled; 2. A copy of an indictment found, or an affidavit made before a magistrate charging the fugitive with having committed the crime; 3. Such copy of the indictment or affidavit must be certified as authentic by the executive. If these pre-requisites have been complied with, then the warrant of the governor has properly issued, and the prisoner is legally restrained of his liberty. We must look at the return to the habeas corpus for the facts. 1. It is there expressly recited that the governor of Rhode Island has demanded that John L. Clark be arrested and delivered up as a fugitive from justice; 2. That a copy of an affidavit was presented, charging Clark with certain acts which the governor of Rhode Island certifies are made criminal by the laws of that state; 3. That the affidavit is certified by the governor of Rhode Island to be duly authenticated. Here then is a literal compliance with the constitution and laws of the United States, and the governor of New York had full power and authority to issue his warrant, to direct Clark to be arrested and delivered over to the agent of the state of Rhode Island.

"Having thus inquired into and ascertained what are the duties of other officers, we are next to inquire into our own duties. These are to be found in our statutes. They direct (2 R. S. 567, 8, 9) that the court or officer authorized to allow the habeas corpus shall, upon the return thereof, proceed to examine into the facts contained in the return. If no legal cause be shown for the imprisonment, the party shall be discharged; but if he is legally detained, he shall be remanded. The provisions of our statute seem to contemplate an imprisonment upon a charge of an offence against our own laws; but the prisoner is entitled to the benefit of those provisions, so far as they are applicable. The 48th section, page 569, permits the party, upon the return of the habeas corpus, to deny on oath any of the material facts set forth in the return, or allege any fact to show the detention unlawful; and then the court or officer shall, in a summary way, proceed to hear proofs and allegations, and dispose of the party as justice may require. Under this section, the prisoner has made an affidavit denying all criminalty or fraud in relation to the Burrillville bank, which are charged against him in the affidavit presented to the governor of this state. But whether he is guilty or not, is not

the question to be decided here; it is whether he has been properly *charged with guilt*, according to the constitution and the act of congress. The prisoner does not deny any act set forth in the warrant upon which he has been arrested. It is not denied that the governor of Rhode Island has demanded him as a fugitive from justice. It is not denied that an affidavit charging him with criminality was presented to the governor of New York; nor is it denied that the governor of Rhode Island has certified that the affidavit is properly authenticated. These are material facts. Governor Throop does not assert the prisoner's guilt, but that he had before him such evidence as the law directed to authorize the issuing his warrant. Whether the prisoner is guilty or innocent is not the question before us; nor is any judicial tribunal in this state charged with that inquiry. By the constitution, full faith and credit are to be given in all the states to the judicial proceedings of each state. When such proceedings have been had in one state, which ought to put any individual within it upon his trial, and those proceedings are duly authenticated, full faith and credit shall be given to them in every other state. If such person flee to another state, it is not necessary to repeat in such state to which he has fled the initiatory proceedings which have already been had, but he is to be sent back to be tried where the offence is charged to have been committed—to have the proceedings consummated where they were begun."

"It has been objected that no crime has been committed, and that the proceedings contemplated by the statute of Rhode Island are of a *civil* nature merely. The first answer is that the statute of Rhode Island is not properly before us. An offence of a highly immoral character is stated in the warrant, and is certified by the governor of Rhode Island to have been made criminal by the laws of that state. This is evidence enough, in this stage of the proceedings, of the nature of the offence; but if we look into the statute of Rhode Island, which has been informally read from their statute book, we find a criminal offence; it is this: that if any officer of a bank shall so fraudulently manage its concerns that the public or any individual dealing with it shall be defrauded in the payment of their just demands, such officer shall be prosecuted in the supreme judicial court by indictment, and on conviction the offender may be fined $5000. This is very plain language. There is to be a prosecution by *indictment*, and a fine is imposed which goes of course to the *public*—not to the party defrauded. There is nothing here like a civil remedy, and though the indictment and trial are to take place in the supreme court, yet criminal proceedings do not commence there. The first proceeding is usually, if not always, before an inferior magistrate; but in this case an affidavit is all that is required, provided it is duly authenticated.

"It was also objected that a crime of greater atrocity was intended by the constitution than is here charged. It seems that when proceedings are instituted by the comity of nations they apply only to crimes of great atrocity, or deeply affecting the public safety. (1 Kent's Com. 36.) The statute of our state to which Chancellor

Kent refers has been repealed, and I have not found the substance of it re-enacted in the revised statutes, but what may have been intended as a substitute—that certain offences committed out of our jurisdiction may be punished within it. (2 R. S. 698, sec. 4.) With the comity of nations we have at present nothing to do, unless perhaps to infer from it that the framers of our constitution and laws intended to provide a more perfect remedy; one which should reach every offence criminally cognizable by the laws of any of the states; The language is treason, felony, or other crime; the word crime is synonimous with misdemeanor (4 Black. Com. 5), and includes every offence below felony punished by indictment as an offense against the public.

"An objection was also taken to the warrant for omitting to state facts; and among other cases that of the King v. Kendall & Roe was referred to (1 Salk. 347, 12 Mod. 82, 1 Lord Raym. 65), where, upon a return to a habeas corpus the prisoners were bailed, having been arrested by a warrant of a secretary of state for aiding James Montgomery to escape, who was committed on suspicion of treason, because the treason was not set forth in the warrant with an allegation that Montgomery did the fact. The case is not analagous; the offense of Kendall & Roe was aiding a person to escape from custody, and their offence would be graduated by that of the person assisted; it was important therefore that it should be stated; but this is a proceeding regulated by positive statute, and the warrant need contain no more than the statute requires.

"I am of opinion that the proceedings in this case have been regular; that the prisoner is legally in custody of the officer, and that he should be remanded." (Re Clark, 9 Wendell, 218, A. D. 1832.)

"By the constitution and laws of the United States the governor of Alabama had the right to demand Allen; and the governor of Tennessee had the power to give him up. Indeed, it would have been his imperative duty to have done so, if he had not rendered himself, by the commission of crime, amenable to our criminal laws. This would have justified the governor of Tennessee in detaining him till he had made satisfaction therefor." (State v. Allen, 2 Humph. Tenn. 258, A. D. 1840.)

"If, therefore, the clause of the constitution had stopped at the mere recognition of the right, without providing or contemplating any means by which it might be established and enforced in cases where it did not execute itself, it is plain that it would have, in a great variety of cases, a delusive and empty denunciation. If it did not contemplate any action either through state or national legislation, as auxiliaries to its more perfect enforcement in the form of remedy, or of protection, then, as there would be no duty on either to aid the right, it would be left to the mere comity of states to act as they should please, and it would depend for its security upon the changing course of public opinion, the mutations of public policy, and the general adaptations of remedies for purposes strictly according to the lex fori.

"And this leads us to the consideration of the other part of the clause, which implies at once a guaranty and duty. It says, 'But he (the slave) shall be delivered up on claim of the party to whom such service or labor may be due.' Now, we think it exceedingly difficult, if not impracticable, to read the language and not to feel, that it contemplated some farther remedial redress than that, which might be administered at the hands of the owner himself. A claim is to be made. What is a claim? It is, in just judicial sense, a demand of some matter as of right made by one person upon another, to do or to forbear to do some act or thing as a matter of duty. A more limited, but at the same time an equally expressive definition was given by Lord Dyer, as cited in Stowell v. Zouch, Plowden, 359; and it is equally applicable to the present case: that 'a claim is a challenge by a man of the propriety or ownership of a thing,' which he has not in possession, but which is wrongfully detained from him.' The slave is to be delivered up on the claim By whom to be delivered up? In what mode to be delivered up? How, if a refusal takes place, is the right of delivery to be enforced? Upon what proofs? What shall be the evidence of a rightful reception or delivery? When and under what circumstances shall the possession of the owner, after it is obtained, be conclusive of his right, so as to preclude any further inquiry or examination into it by local tribunals or otherwise, while the slave, in possession of the owner, is in transitu to the state from which he fled?

"These, and many other questions, will readily occur upon the slightest attention to the clause; and it is obvious that they can receive but one satisfactory answer. They require the aid of legislation to protect the right, to enforce the delivery, and to secure the subsequent possession of the slave. If, indeed, the constitution guarantees the right, and if it requires the delivery upon the claim of the owner (as cannot well be doubted), the natural inference certainly is, that the national government is clothed with the appropriate authority and functions to enforce it. The fundamental principle, applicable to all cases of this sort, would seem to be, that where the end is required the means are given; and where the duty is enjoined the ability to perform it is contemplated to exist on the part of the functionaries to whom it is entrusted. The clause is found in the national constitution, and not in any state. It does not point out any state functionaries, or any state action to carry its provisions into effect. The state cannot, therefore, be compelled to enforce them; and it will be deemed an unconstitutional exercise of the power of interpretation, to insist that the states are bound to provide means to carry into effect the duties of the national government, nowhere designated or intrusted to them by the constitution. On the contrary, the natural, if not the necessary conclusion is, that the national government, in the absence of all positive provisions to the contrary, is bound, through its own proper departments, legislative, judicial or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the constitution. The remark of Mr. Madison, in the Federalist (No. 43), would seem in such cases to ap-

ply with peculiar force. 'A right (says he) implies a remedy; and where else would a remedy be deposited than where it is deposited by the constitution?' meaning, as the context shows, in the government of the United States." * *

"In a general sense, this act may be truly said to cover the whole ground of the constitution, both as to fugitives from justice and fugitive slaves; that is, it covers both the subjects in its enactments; not because it exhausts the remedies which may be applied by congress to enforce the rights, if the provisions of the acts shall in practice be found not to attain the object of the constitution; but because it exhausts the remedies which may be applied by Congress to enforce the rights, if the provisions of the act shall in practice be found not to attain the object of the constitution; but because it points out fully all the modes of attaining those objects, which congress, in their discretion, have as yet deemed expedient or proper to meet the exigencies of the constitution. If this be so, then it would seem, upon just principles of construction, that the legislation of congress, if constitutional, must supercede all state legislation upon the same subject; and by necessary implication prohibit it. For, if congress have a constitutional power to regulate it in a given manner, and in a certain form, it cannot be that state legislatures have a right to interfere, and, as it were, by way of complement to the legislation of congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of congress, in what it does prescribe, manifestly indicates, that it does not intend that there shall be any farther legislation to act upon the subject matter. Its silence as to what it does not do, is as expressive of what its intention is as the direct provisions made by it. This doctrine was fully recognized by this court in the case of Houston v. Moore, 5 Wheat. Rep. 1, 21, 22, where it was expressly held that where congress have exercised a power over a particular subject given them by the constitution, it is not competent for state legislation to add to the provisions upon that subject; for that the will of congress upon the whole subject is as clearly established by what it had not declared as by what it has expressed." * *

"The very act of 1793, now under consideration, affords the most conclusive proof that congress has acted upon a very different rule of interpretation, and has supposed that the rights as well as the duty of legislation on the subject of fugitives from justice and fugitive slaves, was within the scope of the constitutional authority conferred on the national legislature. In respect to fugitives from justice, the constitution, although it expressly provides that the demand shall be made by the executive authority of the state from which the fugitive has fled, is silent as to the party upon whom the demand is to be made, and as to the mode in which it shall be made. This very silence occasioned embarrassments in enforcing the right and duty at an early period after the adoption of the constitution, and produced a hesitation on the part of the executive authority of Virginia to deliver up a fugitive from justice, upon the demand of the executive of Pennsylvania, in the year 1791; and as we historically know from the

message of President Washington and the public documents of that period, it was the immediate cause of the passing of the act of 1793, which designated the person (the state executive) upon whom the demand should be made, and the mode and proofs upon and in which it should be made. From that time down to the present hour not a doubt has been breathed upon the constitutionality of this part of the act; and every executive in the union has constantly acted upon and admitted its validity. Yet the right and the duty are dependent, as to their mode of execution, solely on the act of congress; and but for that, they would remain a nominal right and passive duty, the execution of which being intrusted to and required of no one in particular, all persons might be at liberty to disregard it. This very acquiescence, under such circumstances, of the highest state functionaries, is a most decisive proof of the universality of the opinion that the act is founded on a just construction of the constitution, independent of the vast influence which it ought to have as a cotemporaneous exposition of the provisions by those who were its immediate framers or intimately connected with its adoption." * *

"The remaining question is, whether the power of legislation upon this subject is exclusive in the national government, or concurrent in the states, until it is exercised by congress. In our opinion it is exclusive; and we shall now proceed briefly to state our reasons for that opinion. The doctrine stated by this court in Sturgis v. Crowninshield, 4 Wheat. Rep. 122, 193, contains the true, although not the sole rule or consideration, which is applicable to this particular subject. 'Wherever,' said Mr. Justice Marshall, in delivering the opinion of the court, 'the terms in which a power is granted to congress, or the nature of the power require that it should be exercised exclusively by congress, the subject is as completely taken from the state legislatures as if they had been forbidden to act.' The nature of the power, and the true objects to be attained by it, are then as important to be weighed, in considering the question of its exclusiveness, as the words in which it is granted.

"In the first place, it is material to state (what has already been hinted at), that the right to seize and retake fugitive slaves, and the duty to deliver them up, in whatever state of the union they may be found, and of course the corresponding power of congress to use the appropriate means to enforce the right and duty, derive their whole validity and obligation exclusively from the constitution of the United States, and are there, for the first time, recognized and established in that peculiar character. Before the adoption of the constitution, no state had any power whatsoever over the subject, except within its own territorial limits, and could not bind the sovereignty or legislation of other states. Whenever the right was acknowledged or the duty enforced in any state, it was a matter of comity and favor, and not as a matter of strict moral, political or international obligation or duey. Under the constitution it is recognized as an absolute, positive right and duty, pervading the whole union with an equal and supreme force, uncontrolled and uncontrollable by state sovereignty or state legislation. It is, therefore, in a just sense a new and posi-

tive right, independent of comity, confined to no territorial limits, and bounded by no state institutions or policy. The natural inference deducible from this consideration certainly is, in the absence of any positive delegation of power to the state legislatures, that it belongs to the legislative department of the national government, to which it owes its origin and establishment. It would be a strange anomaly and forced construction to suppose that the national government meant to rely for the due fulfillment of its own proper duties and the rights it meant to secure, upon state legislation, and not upon that of the union. A fortiori, it would be more objectionable to suppose that a power, which was to be the same throughout the union, should be confided to state sovereignty, which could not rightfully act beyond its own territorial limits.

"In the next place, the nature of the provision and the objects to be obtained by it, require that it should be controlled by one and the same will, and act uniformly by the same system of regulations throughout the union. If, then, the states have a right, in the absence of legislation by congress, to act upon the subject, each state is at liberty to prescribe just such regulations as suit its own policy, local convenience, and local feelings. The legislation of one state may not be different from, but utterly repugnant to and incompatible with that of another. The time, and mode, and limitation of the remedy, the proofs of the title, and all other incidents applicable thereto, may be prescribed in one state which are rejected or disclaimed in another One state may make a statute of limitations as to the remedy, in its own tribunals, short and summary; another may prolong the period, and yet restrict the proofs. Nay, some states may utterly refuse to act upon the subject at all; and others may refuse to open its courts to any remedies in rem, because they would interfere with their own policy, institutions or habits. The right, therefore, would never, in a practical sense be the same in all the states. It would have no unity of purpose or uniformity of operation. The duty might be enforced in some states, retarded or limited in ethers, and denied as compulsory in many, if not in all. Consequences like these must have been foreseen as very likely to occur in the non-slaveholding states, where legislation, if not silent on the subject and purely voluntary, could scarcely be presumed to be favorable to the exercise of the rights of the owner." (Prigg v. Commonwealth of Pennsylvania, 16 Peters, 614–624, A. D. 1842.)

"The importance of this case, and the consequences which may flow from an erroneous precedent, affecting the lives and liberties of our citizens, have impelled the court to bestow upon it the most anxious consideration. The able arguments of the counsel for the respective parties, have been of great assistance in the examination of the important question arising in this cause.

"When the patriots and wise men who framed our constitution were in anxious deliberation to form a perfect union among the states of the confederacy, two great sources of discord presented themselves to their consideration; *the commerce between the states, and fugitives from justice and labor*. The border collusions in other countries had

been seen to be a fruitful source of war and bloodshed, and most wisely did the constitution confer upon the national government the regulation of those matters, because of its exemption from the excited passions awakened by conflicts between neighboring states, and its ability alone to adopt a uniform rule and establish uniform laws among all the states in those cases.

"This case presents the important question arising under the constitution and laws of the United States, whether a citizen of the state of Illinois can be transported from his own state to the state of Missouri, to be there tried for a crime, which if ever committed, was committed in the state of Illinois; whether he can be transported to Missouri, as a fugitive from justice, when he has never fled from that state

"Joseph Smith is before the court on habeas corpus, directed to the sheriff of Sangamon county, state of Illinois. The return shows that he is in custody under a warrant from the executive of Illinois, professedly issued in pursuance of the constitution and laws of the United States, and of the state of Illinois, ordering said Smith to be delivered to the agent of the executive of Missouri, who had demanded him as a fugitive from justice, under the 2d section, 4th article of the constitution of the United States, and the act of congress passed to carry into effect that article. The article is in these words, viz: 'A person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall on the demand of the executive authority of the state from which he fled, be delivered up to the state having jurisdiction of the crime.' The act of congress made to carry into effect this article, directs that the demand be made on the executive of the state where the offender is found, and prescribes the proof to support the demand, viz: indictment or affidavit.

"The court deemed it respectful to inform the governor and attorney general of the state of Illinois of the action upon the habeas corpus. On the day appointed for the hearing, the attorney general of the state of Illinois appeared and denied the jurisdiction of the court to grant the habeas corpus.

"1st. Because the warrant was not issued under color or by authority of the United States, but by the state of Illinois.

"2d. Because no habeas corpus can issue in this case from either the federal or the state courts, to inquire into the facts behind the writ. In support of the first point a law of Illinois was read, declaring that whenever the executive of any other state shall demand of the executive of this state, any person as a fugitive from justice, and shall have complied with the requisition of the act of congress, in that case made and provided, it shall be the *duty* of the executive of this state to issue his warrant to apprehend the said fugitive, etc. It would seem that this act does not purport to confer any additional power upon the executive of this state, independent of the power conferred by the constitution and laws of the United States, but to make it the *duty* of the executive to obey and carry into efiect the act of congress. The warrant on its face purports to be issued in pursuance

of the constitution and laws of the United States, as well as of the state of Illinois. To maintain the position that this warrant was not issued under color or by authority of the laws of the United States, it must be proved that the United States could not confer the power on the executive of Illinois. Because if congress could and did confer it, no act of Illinois could take it away, for the reason that the constitution and laws of the United States, passed in pursuance of it, and treaties, are the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding. This is enough to dispose of that point. If the legislature of Illinois, as is probable, intended to make it the *duty* of the governor to exercise the power granted by congress, and no more, the executive would be acting by authority of the United States. It may be that the legislature of Illinois, appreciating the importance of the proper execution of those laws, and doubting whether the governor could be punished for refusing to carry them into effect, deemed it prudent to impose it as a duty, the neglect of which would expose him to impeachment. If it intended more, the law is unconstitutional and void. (16 Peters, 617. Prigg v. Pennsylvania.)" * *

"It is contended that the United States is a government of granted powers, and that no department of it can exercise powers not granted. This is true. But the grant is to be found in the 2d section of the 3d article of the constitution of the United States. 'The judicial power shall extend to all cases in law, or equity, arising under this constitution, the laws of the United States, and treaties made and which shall be made under their authority.'

"The matter under consideration presents *a case* arising under the 2d section, 4th article of the constitution of the United States, and the act of congress of February 1 th, 1793, to carry it into effect. The judiciary act of 1789 confers on this court (indeed on all the courts of the United States) power to issue the writ of habeas corpus, when a person is confined 'under color of or by the authority of the United States.' Smith is in custody under color of, and by authority of the 2d section, 4th article of the constitution of the United States. As to the instrument employed or authorized to carry into effect that article of the constitution (as he derives from it the authority to issue the warrant) he must be regarded as acting by the authority of the United States. The power is not official in the governor, but personal. It might have been granted to any one else by name, but considerations of convenience and policy recommended the selection of the executive, who never dies. The citizens of the states are citizens of the United States; hence the United States are as much bound to afford them protection in their sphere as the states are in theirs.

"This court has jurisdiction. Whether the state courts have jurisdiction or not, this court is not called upon to decide.

"The return of the sheriff shows that he has arrested and now holds in custody Joseph Smith, in virtue of a warrant issued by the governor of Illinois, under the 2d section of the 4th article of the constitution of the United States, relative to fugitives from justice,

and the act of congress passed to carry it into effect. The article of the constitution does not designate the person upon whom the demand for the fugitive shall be made, nor does it prescribe the proof upon which he shall act. But congress has done so. The proof is 'an indictment or affidavit,' to be certified by the governor demanding. The return brings before the court the warrant, the demand and the affidavit." Ex parte Smith, 3 McLean, 121, A. D. 1842.

"The second section of the fourth article of that instrument was intended to make the arrest and surrender of the criminal, on demand of the executive authority of the state from which he fled, an imperative duty; and not to depend on the discretionary exercise of a right or power. This duty, by the first section of the act of congress of 1793, is imposed on the executive authority of the state to which the criminal has fled. To enable the executive to perform this duty it is necessary that magistrates should have the power to arrest and commit the fugitive, before, as well as after a demand has been made. If prior to the adoption of the constitution, he found no protection in the state to which he fled; since then, no reason exists why an asylum should be afforded to him, until a demand is made on the executive of the state where he seeks refuge, and a warrant issues to arrest and secure him. The exercise of the power is essential to carry into effect the provisions of the constitution; otherwise an immunity may be afforded to the most atrocious criminals. If a felon notoriously guilty of a murder, can, by escaping into another state, set the law at defiance, until a demand is regularly made on the executive, and a warrant is issued for his arrest, the object of the constitution may be defeated, and the act of congress rendered nugatory. By the time a requisition is obtained, and a warrant granted in due form, the offender may fly to another state; where he again finds a sanctuary until the same formalities are repeated" (State of Delaware v. Buzine, 4 Harr. 575, A. D. 1846.

"Every person * restrained * is entitled to the writ of habeas corpus, unless his petition shows * that he is legally imprisoned by the authority of the United States." * *

"So in like manner, if the return to the habeas corpus sets forth that the party is a fugitive from justice, that he was demanded as such, and was arrested and committed for the purpose of being surrendered; the only inquiry is, whether the provisions of the act of congress of 1793 have been complied with. If that fact is shown by the return and by the warrant of the executive authority under which the fugitive has been arrested, it constitutes a just and legal cause for his imprisonment and detention. The right and power under the constitution of the United States, and the first section of the act of congress of 1793, to demand, arrest, commit and surrender fugitives from justice, are exclusively vested in and confided to, the executive authority of the state from which the fugitive has escaped, and that of the state where he has taken refuge. To authorize the latter to take cognizance of the case, and to perform the duty imposed upon him, the act of congress prescribes, 1st. That the demand shall be made by the executive of the state from which the fugitive has fled.

2d. That a copy of an indictment found, or of an affidavit before a magistrate, charging the person demanded with having committed a crime, shall be produced with the demand. 3d. That such copy of the indictment or affidavit shall be certified as authentic by the executive of the state from whence the person so charged fled. These matters are entrusted to the judgment of the executive upon whom the demand is made; and if his mind is fully satisfied in regard to them, the act of congress makes tt his imperative duty to cause the fugitive to be arrested and delivered up to the regularly constituted agent of the state from which he fled. The warrant of the executive under the great seal of the state, reciting the facts necessary, under the act of congress, to give him jurisdiction of the case, would in my opinion, at the hearing of the habeas corpus, be conclusive evidence of the existence of these facts, of his judgment in relation to them, and of a compliance with the constitution of the United States and the act of congress. No investigation therefore in such a case, can be made beyond the warrant of the executive, and no examination into the facts and circumstances of the alleged offence with which the party stands charged. The case would not be within the operrtion of the habeas corpus act of this state, even were it not expressly excepted by the fourth section." (Dig. 295.) State v. Schlemn, 4 Harr. 579 A. D. 1846.

"This clause of the constitution does not contain a grant of power. It confers no right. It makes *obligatory* upon every member of the confederacy the performance of an act which previously was of doubtful obligation." * *

"The whole effect of the constitution was to confer upon each member of the confederacy a *right to demand* from every other member of the confederacy a fugitive, and to make *obligatory* the surrender which was before discretionary. If, then, there exists, independent of constitutional provision or treaty obligation, a right in every sovereign state to surrender criminals against the laws of other countries, there must also, of necessity, exist in every state the power of arresting and detaining such fugitive. The mere power of surrender, without the power of arrest and detention, would be nugatory. It is remarkable, indeed, that both the constitution and the act of congress of 1793 assume that the one power is a necessary consequence of the other. Neither the constitution nor the law confers, except by implication, the power of arrest or imprisonment." * *

"If this principle be sound, as applied to the intercourse of independent foreign nations, in support of the right to reclaim fugitives from justice, it applies with far greater force and clearness in support of the express provision of the constitution, making the surrender of fugitives from justice obligatory upon every member of the confederacy. The denial of the power to arrest and detain an offender until the demand for his surrender be actually made, would, it is manifest, render the provision of the constitution well nigh nugatory If a person committing murder, robbery, or other high crime in one state may, by crossing a river, or an imaginary line, avoid arrest or detention until an executive requisition and order for his surrender may be

obtained, the execution of the criminal law would be impotent indeed. Sound public policy, good faith, a fulfillment of the requirements of the constitution, all require that the arrest and detention be made of the offender, wherever he may be found, preparatory to a demand and surrender." * *

"I am of opinion, both upon principle and authority, that a fugitive from justice, from either of the United States, may, under the provisions of the constitution, be arrested and detained in this state preparatory to his surrender, before a requisition is actually made by the executive of the state where the crime is committed. It is an exercise of power essential to the full operation of the constitution, and has been sanctioned by a long and uniform course of practice." (Re Fetter, 3 Zab. 311, A. D. 1852.)

"Inasmuch as this record presents a question of the first impression in our courts, we will avail ourselves of the occasion to express our general views, in relation to the duties and obligations of the executive officers of the several states in delivering up of fugitives from justice, to be removed to *the state having jurisdiction of the crime*, as provided by the constitution and laws of the United States. It is unquestionably true, that each state has a perfect right to enact such penal laws, to operate within its own territory, as may, in her judgment, best protect persons and property; provided, always, that such laws are not *repugnant* to the supreme law of the United States. Whenever the laws of such state are violated within its territorial jurisdiction, and the offender flees into the territory of another state, the supreme law of the land declares, that such fugitive *shall be delivered up on demand of the executive of the state from which he fled* to that state having jurisdiction of *the crime*. (See 4 art. constitution U. S., sec. 2.) By the act of 1793, provision is made to carry into *practical* effect this provision of the constitution. All that is required of the executive authority of any state in the union, when a fugitive from justice is demanded of the executive authority of any other state, is, to produce the copy of an *indictment found*, or an *affidavit made* before a magistrate of such state, charging the person so demanded with having committed a *crime against the laws thereof*, duly certified as authentic, by the chief magistrate of the state from whence the person so charged fled." * *

"As between sovereign and independent nations, the harboring and protecting criminals, and refusing to surrender them up on demand, to that government whose laws have been violated, may be considered as *just cause of war;* but *one state* of the American union is prohibited, by the constitution, from declaring war against *another state*, in order to obtain redress for this *wrong* and *bad faith* on the part of the offending state; and hence, the obligation imposed by the constitution, may be urged, with *increased force*, in favor of the delivery of the fugitive who may be charged *in any state*, with a *criminal offence* against the laws of such state. In order to secure a *faithful execution of this*, as well as the other provisions of the constitution, each executive officer of the several states is required to swear that *he will support it*. To refuse to deliver up a fugitive from

justice by the executive officer of the state in which such fugitive may have taken refuge, on *the legally authorized demand* of the executive officer of the state from which he fled. on *the pretext*, that by the laws of the state in which the fugitive is found, he is not guilty of any criminal offence, would be, in our judgment, an *open, palpable violation of the constitution*, to say nothing of the *comity* and *good faith*, which ought always to exist between all civilized independent states, and more especially the confederate states of the American union." (Johnston v. Riley, 13 Ga., 133, A. D. 1853.

"It may be as well to state, *in limine*, that I do not consider, under the distribution of power by the constitution of this state, the judiciary are denied jurisdiction in this class of cases. The very object of the habeas corpus was to reach just such cases; and while the courts of the state possess no power to control the executive discretion and compel a surrender, yet, having once acted, that discretion may be examined into, in every case where the liberty of the subject is involved

"The extradition of the subject is a dangerous power, which cannot be too carefully watched, and ought not to be trusted alone to the executive, while, at the same time, the obligations of the states to carry out, in good faith, the provisions of the constitution and laws of the United States, is paramount, and should be observed, not only as a solemn compact, but should be administered with that executive and judicial comity among kindred states." (Re Manchester, 5 Cal. 237, A. D. 1855.)

"After due consideration, I am of opinion that the provision applies only to those acts which if committed within the jurisdiction of the state in which the person accused is found, would be treasonable, felonious or criminal, by the laws of that state." (Seward's works, vol. 2, p. 452.)

"Can only be delivered up upon the formal requisition of the governor of the state, in compliance with constitutional provision." (Botts v. Williams, 17 B. Mon., Ky., 689, A. D. 1856.

"The governor's warrant is insufficient on its face. * *

"It was also objected to the legality of this arrest, that the act of congress of 1793 is limited by its terms to requisitions made by the executive of a state or of either of the territories northwest or south of the Ohio, and also that the constitution of the United States is limited to requisitions made by executives of states, and hence does not authorize the act of congress so far as it imposes an obligation on the executive of a state to surrender a fugitive on the requisition of the executive of a territory. These are serious objections, and not easily disposed of; but I have preferred to dispose of this application on the grounds and upon the application of adjudged cases. Surrounded as this state is—and for a long time will continue to be—by territories, it will be a great evil if the criminals who will seek an asylum here from the justice of those territories cannot be demanded and removed. * * Prisoners discharged." (Re Edwards et al., 12th Dist. Court, San Francisco, March 25, A. D. 1858.)

"But our constitution contemplates the exercise of a much *broader* power than was ever claimed to exist under the law of nations, inde-

pendent of treaty stipulations, and it is a power most salutary in its general operation, inasmuch as it serves to discourage the commission of crime by cutting off to some extent the means of escape from punishment, and we trust the exercise of this power has hitherto been as useful in practice as its character is unexceptional in principle. This provision in the constitution and laws of congress has received a practical, uniform construction from Maine to Georgia, from an early day in our judicial history, if indeed, it can be said to admit of construction. It has also been the subject of repeated judicial determination, and he must, I think, be a bold man, who at the present day is ready to hold that the *subject matter* of the complaint against Greenough is not within the constitution and laws of congress. The language is broad and the crime charged is within its letter, and I apprehend, equally within the reason and spirit of the provision. It has been frequently held that the crime charged need not be a felony in the state where it is alleged to have been committed, or an offence at common law. * *

"This provision in the constitution relative to fugitives from justice was wisely made a part of the original compact between the states, and it is in the nature of a treaty stipulation, and is eminently calculated to promote harmony and good feeling between them. The well working of our national government is intimately connected with this provision, and its just and salutary execution. * *

"The executive, in one sense acts *ministerially* in issuing his warrant, in another *judicially*. So far as it is his duty to see that the case is a proper one for issuing his warrant, the character of his acts is strictly *judicial*." (Re Greenough, 31 Vt., 286, A. D. 1858.)

"For this was not a compact of peace and comity between separate nations who had no claim on each other for mutual support, but a compact binding them to give aid and assistance to each other in executing their laws, and to support each other in preserving order and law within its confines, whenever such aid was needed and required; for it is manifest that the statesmen who framed the constitution were fully sensible, that from the complex character of the government, it must fail unless the states mutually supported each other and the general government; and that nothing would be more likely to disturb its peace, and end in discord, than permitting an offender against the laws of a state, by passing over a mathematical line which divides it from another, to defy its process, and stand ready, under the protection of the state, to repeat the offence as soon as another opportunity offered. * *

"This duty of providing by law the regulations necessary to carry this compact into execution, from the nature of the duty and the object in view, was manifestly devolved upon congress; for it was left to the states, each state might require different proof to authenticate the judicial proceeding upon which the demand was founded; and as the duty of the governor of the state where the fugitive was found is, in such cases, merely ministerial, without the right to exercise either executive or judicial discretion, he could not lawfully issue a warrant to arrest an individual without a law of the state or of congress to

authorize it. These difficulties presented themselves as early as 1791, in a demand made by the governor of Pennsylvania upon the governor of Virginia, and both of them admitted the propriety of bringing the subject before the president, who immediately submitted the matter to the consideration of congress. And this led to the act of 1793, of which we are now speaking. All difficulty as to the mode of authenticating the judicial proceeding was removed by the article in the the constitution, which declares, 'that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings, of every other state; and the congress may by general laws, prescribe the manner in which acts, records, and proceedings, shall be proved, and the effect thereof.' And without doubt the provision of which we are now speaking—that is, for the delivery of a fugitive, which requires official communications between the states, and the authentication of official documents—was in the minds of the framers of the constitution, and had its influence in inducing them to give this power to congress. And acting upon this authority and the clause of the constitution which is the subject of the present controversy, congress passed the act of February 12th" (Kentucky v. Denniston, 24 How. 104, A. D., 1860.

"The first question raised by the counsel for the applicants is, that congress had no power to pass the act relating to the rendition of fugitives from justice; and if they have, it is confined, under the provisions of the national constitution, to fugitives escaping from one 'state' to another ,state,' and does not extend to fugitives fleeing from a 'territory.' The clause of the national constitution thus brought in question is as follows: 'A person charged in any state with treason, felony or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.' It will be noticed that congress is not referred to in this clause, nor is any power over the matter conferred upon that body. In the same article in which it is found, several important subjects are treated of, over some of which power is conferred upon congress, and in others not. Thus in regard to the public acts, records, and judicial proceedings of the states, the admission of new states, the disposal of the territory and other property of the United States, and the guaranty of a republican form of government to each state, full power over these subjects is directly conferred upon congress; but as to all other matters in that article, including the clause in question, no power is conferred upon congress. They stand as solemn compacts between the states, to be enforced by state legislation, or by judicial action. They are, to a great extent, a recognition of rights founded upon principles of international law, but which were under that law often deemed more a matter of comity than of absolute right, except the provision respecting the rights of citizenship, which go beyond any rule of international law.

"Upon this very subject of the surrender of fugitives from justice fleeing from one state or nation to another, under the rules of international law, it has been a question very fully and ably discussed by

public writers, whether such surrender was a matter of right and duty or merely comity. (Story on conflict of laws, secs. 626–628.) This was deemed too important a question to leave unsettled, and the framers of our national constitution wisely inserted the clause referred so, making it no longer a matter of mere comity subject to the pleasure of each state, but an absolute right and duty. This provision being a part of the supreme law of the land, it is a part of the law of each state, and state officers whose duty it is to adjudicate or execute the laws, are governed by it the same as by every other law in force. (Re Romaine, 23 Cal. 582, A. D. 1863.)

"The federal constitution having given congress the *exclusive* power to legislate regarding the surrender of fugitives from justice; that power having been exercised by congress, it follows that our statute, under which the police court acted, is inoperative and void, and the petitioner is illegally held by the commitment and proceedings thereunder.

"Therefore the petitioner, Donahue, is discharged from custody." (Re Donahue, 15th Dist. Ct., San Francisco, Oct. 24, A. D. 1866.

"We are not putting a construction upon a treaty between indepedent nations; we are putting a construction upon a *constitution* adopted by by the people of the United States in order to form a more perfect union, establish justice," &c. In this instrument we find provision that any person charged with treason, felony or other crime, shall be delivered up &c. The words are general; no specific offence, as forgery, is named, and, in the very nature of things, this being a part of the fundamental law of the United States, has reference to such changes in the criminal law as might thereafter be made in any state of the union; so the position that a rule of construction which may have been properly applied to a treaty, is applicable to the constitution of the United States, is untenable." (Re Hughes, Phil., N. C., L. 57, A. D. 1867.)

"The clause of the constitution of the United States, to which this point relates, is as follows: 'A person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime.' The inquiry, therefore, now arising as to the exact meaning of the words 'other crime,' as here used. Counsel, on the part of the prisoner, insist that the expression 'other crime,' does not embrace any crimes which were not such at common law, at the time of the adoption of the constitution of the United States.

"If this construction be correct, it is manifest that the important purpose of the provision will be but very imperfectly accomplished. The highly beneficial object in view was to provide a national assurance that offenders against the criminal laws of one state should not find a sanctuary in the domain of another. The obligation to surrender each fugitive had, to a certain indefinite extent, often been acknowledged in the practice of civilized nations; and was, by some, admitted to be founded in the precepts of that code of universal

morality which constitutes the *jus gentium*. Before the epoch of the constitution, many enlightened rulers had, on various occasions, refused to extend the protection of their sovereignty over criminals fleeing from justice; but still, in theory among writers upon public law, the obligation to make such surrender was, by many regarded as one of questionable character. No one doubted that a nation had the right to deliver up the criminal to justice; but the positive duty to do so, as a doctrine of the law of nations, was, by no means, universally conceded. Besides this imperfection, the grade of crime which created this imperfect obligation to give up the offender, could not, in the nature of things, but be a point of perplexing uncertainty; for while it was clear that the highest class of criminals, such as poisoners, assassins, and all who could be denominated *hostes humani generis*, should be yielded up for punishment, it was generally maintained that the same course was not proper with respect to persons pursued for the lesser offences. It must be conceded, therefore, that the rule so international law upon this subject, would not have been adequate to the exigency arising from the consolidation of the several states of this republic into one nation; and, indeed, before that event, the evils resulting from the absence of a definite rule on the subject, had given rise to treaties between several of the colonies, and had occasioned the introduction of a clause, being similar to the one above quoted from the constitution, among the articles of confederation.

"The purpose, then, of this provision of the constitution was, as I conceive, two-fold; first, to impose an absolute obligation on each state to surrender criminals fleeing from the justice of another state; and, second, to define clearly the class of criminals so to be surrendered. The rule of international comity was defective in both particulars, and the design, consequently, was to create a substitute which should be without either defect. I think this end has been attained. For, in the first place, the language of the clause is so plainly imperative in its character as to leave no room for contention that the obligation now imposed on the respective states to surrender criminals, is, in the least degree, a matter of discretion. In the place of spontaneous submission to the law of comity, there is now substituted that implicit obedience which is due to a rule of law. No state can refuse to surrender this class of criminals, because the right to require such surrender is a part of the sovereignty of the nation. It is true, that under present legal conditions, the general government, as was decided in the case of the Commonwealth of Kentucky v. Dennison, 24 How. 66, cannot enforce the performance of this constitutional obligation. But this results entirely from the fact that the act of congress which regulates these proceedings, directs the constitutional demand to be made upon the governor of the state to which the fugitive has fled; but as the executive of a state is not a federal officer, the general government cannot compel the performance of a function which it has no right to annex to the office. This was the extent of the decision just referred to; but I can entertain no doubt of the power of congress to vest in any national officer the authority to cause the arrest in any state of a fugitive from the justice of another state, and to surrender

such fugitive on the requisition of the executive of the latter state. The national right to require the surrender, under the terms of the constitution, seems to me to be clear, and all that is necessary to render such right enforceable, in every case, is the necessary organ of the federal government. Hitherto the nation has trusted this important office, so essential to the harmony of the states, and the complete administration of the laws, in the hands of the several local executives; and although these officers, as has just been observed, cannot be coerced to take upon themselves the burden of such duty, yet, nevertheless, it is with satisfaction that I remark that it has been for the most part, discharged by them in entire good faith, and with perfect loyalty to the constitutional requisition. The few exceptions which are recollected have, in general, arisen from a mistaken sense as to the true nature of the duty itself; for an idea has undoubtedly prevailed, to a considerable extent, that such duty, in some respects, was one resting in discretion. But this is altogether an error. If the demand be made in due form, and the requisite documents exhibited, showing that the fugitive is charged with crime, the duty to surrender becomes merely a ministerial one. Under such circumstances, to refuse to authorize the extradition is a clear infraction of the rule prescribed in the constitutional clause above quoted. I think it, therefore, indisputable, that the constitution has made the surrender of a fugitive from justice, which by the law of nations depended on the concessions of comity, a rule of law of perfect obligation and entirely imperative in its character.

"Has it removed also the second defect, above enumerated, existing in the international practice? In other words, has this clause of the constitution defined the class of cases to which is attached the constitutional duty of the extradition of the offender. If the usual rules of construction are applicable, I am entirely at a loss to understand how any uncertainty has ever been supposed to exist on this subject. The category of offences is, 'treason, felony, or other crime.' This clause, in the articles of confederation, instead of the term 'crime,' contained the expression 'high misdemeanor.' It is obvious this latter description was indefinite to the last degree, for what was a high misdemeanor? The retention of words whose sense was so undefined would have left the subject open to endless discussion, and there is every reason to believe that the word 'crime' was substituted with a view to avoid a result so disastrous. But I am not aware that any jurist, in any age of the common law, has ever doubted as to the meaning of the word 'crime.' It is *nomen generalissimum*, and has always been considered as embracing every species of indictable offence. How then, in the use in question, is a different meaning to be ascribed to it? It is said that the word must retain the signification it possessed at the time it was used by the framers of the constitution. But it cannot escape remark, that at that time it was well understood that the term thus used was generic, and had been from the beginning, and would be in the future, constantly embracing new species of offences. A word with this quality was indispensable, unless it is to be supposed that it was intended to provide that for every

offence of that day, no matter how trivial, there should be a surrender of the criminal, but that for offences created by future legislation, no matter how heinous, there should be no surrender. The constitution was not a mere temporary contrivance; it was intended for posterity as well as for the then passing generation. In all its various parts it exhibits the clearest manifestations, that it was designed to adjust itself to the exigencies incident to the growth of a great people; and it does not, therefore, appear to me to be a reasonable interpretation to say that in the section under consideration no provision was made for the future. On the contrary, in my opinion, the word 'crime,' with characteristic forethought was selected in lieu of the phrase 'high misdemeanor,' in order to extend the regulation to all classes of offenders, which alone would effect one of the principal objects in view—that of rendering the classification perfectly definite. Nor do I perceive much force to the objection that we cannot suppose it was intended to place within the operation of this provision all persons who might be guilty of minor offences, such as assaults, libels, and the entire train of similar misdemeanors. It is not probable that a state will ever require the surrender of offenders of this grade, but if the demand should be made, and the offence charged be indictable, it is not understood how such demand can be refused. The offence in such case would be a public one; as much so as the commission of the highest crime, and it is embraced in the words of the constitution. It is the right of sovereignty whose laws have been violated, to decide what offenders it will pursue, and the state upon which the demand is made, cannot rightfully call in question that decision. In practice, there will be little danger of an abuse of this constitutional prerogative, and the possibility of such abuse is of but slight consideration, in comparison with the pre-eminently great advantage which will result from the limits of such prerogative being so clearly defined as to be in every respect unquestionable. Nor should it pass without remark, that if the definition of offences given in this clause should be restricted to such as existed by law, at the date of the adoption of the constitution, very many crimes of great atrocity would become dispunishable by the flight of the perpetrators of them. Public policy, the security of society, and the regular and perfect dispensation of justice, as well as the established maxims of statutory construction, alike require that the term crime, as thus used, should be held to comprehend every violation of law which is of a indictable nature.

"Nor is the view of this topic, above taken, a novel one. It is sustained, as it is believed, with complete unanimity by the authorities. 'I am not aware,' says Chancellor Kent, 'that there has been any judicial opinion on this provision, and as it stands, I should apprehend, that on the demand being made and the documents exhibited, no discretion remained with the executive of the state to which the fugitive had fled, and that it was his duty to cause the fugitives to be arrested and surrendered.' 2 Kent's Com. 32, note c.

"In the case of Fetter, 3 Zab. 311, the point was distinctly made, that the offence charged was not indictable at common law, and could only be so by force of a statute of California, but Chief Justice Green

overruled the objection. To the same effect the case of Clark, 9 Wend. 212. In addition to these adjudications of so much weight, we have the important case, already referred to, of the Commonwealth of Kentucky v. Dennison, 24 How. 66, and although this is subject to the criticism of counsel, the court finally determined that it had not jurisdiction, still as the case was fully argued and evidently considered with much care, I cannot but regard the views expressed on this subject of constitutional exposition, as possessed of little less than the force of absolute authority. A reference to the case will show that this point, as to the import of the word 'crime' in this clause, was directly presented for consideration; after a careful discussion, the opinion, delivered by the chief justice, says: 'The conclusion is irresistible, that this compact engrafted on the constitution, included, and was intended to include, every offence made punishable by the law of the state in which it was committed, and it gives the right to the executive authority of the state in which he is found; that the right given to 'demand' implies that it is an absolute right; and it follows, that there must be a correlative obligation to deliver, without any reference to the character of the crime charged, or the policy or the laws of the state to which the fugitive fled.'" (Re Voorhees, 3 Vroom. 141., A. D. 1867.)

"Where a demand is properly made by the governor of one state upon the governor of another, the duty is not absolute and unqualified. It depends upon the circumstances of the case. If the laws of the latter state have been put in force against the fugitive, and he is imprisoned there, the demands of those laws may first be satisfied" * *

"It is true that the constitutional provision and the law of congress, under which the arrest and delivery were made, are obligatory upon every state and a part of the law of every state. But the duty enjoined is several and not joint; and every governor acts separately and independently for himself. There can be no joint demand and no joint neglect or refusal. In the event of refusal, the state making the demand must submit. There is no alternative. In the case of McGuire no impediment appeared to the governor of New York, and he properly yielded obedience. The governor of Connecticut, if applied to, might have rightfully postponed compliance. If advised in season he might have intervened and by a requisition have asserted the claim of Connecticut. It would then have been for the governor of New York to decide between the conflicting demands. Whatever the decision—if the proceedings were regular—it would have been conclusive. There could have been no review and no inquiry going behind it." (Taylor v. Taintor, 16 Wall 366,—A. D. 1872.)

"The words of the provisions of the Constitution and laws of the United States, and of the statutes of the Commonwealth, upon the subject of fugitives from justice, the history of those provisions, and the judicial expositions of them, conclusively establish that the authority of the Governor of this Commonwealth to order the delivery of fugitives from the justice of another state of the Union extends to a person appearing to be charged with any crime whatever in that state.'

'The corresponding provision in the Articles of Confederation, art 4, § 2, included only persons 'charged with treason, felony, or other high misdemeanor.' (1 U. S. Sts at Large, 4.) The article was reported in the same form by a committee of the convention which framed the Constitution of the United States. (Madison's Debates, 1240.) But when this article was taken up in the convention, as we learn from Mr. Madison's report, the words 'high misdemeanor' were struck out, and the words 'other crime' inserted, in order to comprehend all proper cases; it being doubtful whether 'high misdemeanor' had not a technical meaning too limited.' (3 Madison's Debates, 1447.) Aud accordingly the article, as it stands in the Constitution, is in these words: 'A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.' (Const. U. S. art. 4, § 2.) The distinction is made the more significant by comparing it with the provisions that civil officers may be impeached for 'treason, bribery, or other high crimes and misdemeanors;' art. 2, § 4; and that 'the trial of all crimes, except in cases of impeachment, shall be by jury.' (Art. 3, § 2.) The act of Congress, and the statutes of Massachusetts, upon the subject of fugitives from justice, use the same words, 'treason, felony, or other crime.' (U. S. St. 1793, c. 7, § 1. Sts. 1801, c. 10; 1834, c. 155. Rev. Statutes c. 142, § 6, 7. Gen. Statutes c. 177, § 1.'

'The provision of the Constitution of the United States was assumed by this court in (Commonwealth v. Green, 17 Mass. 515, 547,) to extend to all crimes committed in another state. The Justices of the Supreme Court of Maine, in 1837, gave to the Governor of that state an opinion to the same effect. (24 Am. Jur. 233.) And the Supreme Court of New York and New Jersey adjudged upon *habeas corpus* that the Constitution included all crimes indictable by the law of the state from which the prisoner fled. (In re Clark, 9 Wend. 212; in re Voorhees, 3 Vroom. 141.)'

'A like opinion was expressed by the Supreme Court of the United States upon an application by the Governor in the name of the Commonwealth of Kentucky for a mandamus to the Governor of Ohio, to compel him to deliver up a fugitive from justice who had indicted in Kentucky for an act which was not criminal by the law of Ohio. (Commonwealth of Kentucky v. Dennison, Governor of Ohio, 24 How. 66, 102. Although that opinion was in one sense extrajudicial, because not necessary to the judgment, which dismissed the petition for a mandamus, it is proper to refer to it as supporting our reasoning and conclusion.'

'The question how far the governor upon whom the demand is made may rightly exercise any discretion in the matter is not before us, and we therefore give no opinion upon it.'

'The only objections taken by the learned counsel for the prisoner are to the sufficiency of the executive warrant, 1st. because the offence therein mentioned is not one for which the executive is authorized to

order the prisoner to be delivered up; 2d. because the offence is not sufficiently set forth. The first objection we have already answered. The second is equally untenable; for, as appears by the cases already cited, the question is not whether the statement in the warrant would be sufficient in an indictment to put the prisoner upon trial in the state from which he fled, but whether it shows that he has been charged with a crime against the law of that state; and for that purpose the general description in this warrant is sufficient." (Ex parte Brown 112 Mass. 409, A. D. 1873.)

"I am clearly of the opinion that the indictment is bad; that a demurrer to it would be sustained, and that if this defendant was taken to the state of Louisiana, and application was there made to any of the courts of that state for discharge upon writ of habeas corpus, that it would be the duty of such courts to discharge him. I hold that the courts of California have the same powers in this regard that could be exercised by the courts of the state of Louisiana; the indictment should have specifically negatived the alleged false representations.' * * 'Applying the common law rules to this indictment, it is manifestly insufficient; it charges no crime, and the defendant should be manifestly discharged from custody, and it is so ordered." (Re Jones, 4th Dist. Court, San Francisco Jan. 7. A. D. 1874.)

"The right of a state to demand and the obligation of a state upon which the demand is made to surrender a fugitive from justice, rests exclusively upon the federal constitution, and the act of congress of 1793. The constitution declares that, 'a person charged in any state with treason, felony or other crime, who shall flee from justice and be found in any other state, shall on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime' It is plain from the language of this clause of the constitution, that the obligation of a state to deliver a fugitive from justice, on demand of the state from which he fled, arises when the fugitive is charged with crime within the state demanding the surrender. The question of his guilt or innocence is wholly irrelevant in determining the action of the executive of the state upon which the demand is made. That question is to be investigated and determined by the courts of the state where the alleged crime was committed. But there must be a charge of crime existing against the fugitive in the state demanding his surrender, before the demand can legally be made, and it was said by Taney, Ch. J., in Com. of Kentucky v. Dennison, 24 How., U. S., 104, that it must be a charge made in the regular course of judicial proceedings." (People v. Brady, 56 N. Y. 152, A. D. 1874.)

"The papers in the case, copied into the record, show that the appellant is charged in Illinois with the crime which is neither treason nor felony, but is a misdemeanor punishable by a fine not exceeding five thousand dollars, and the question, and only question, made by the appellant is, whether the case is one coming within the constitution and laws of the United States relating to the surrender or extradition of fugitives from justice, fleeing from one state to another. Does the act charged come within the meaning of the word 'crime,' as

used in the constitution of the United States, art. 4, sec. 2? We have examined the question thus presented with such care as the time and circumstances would allow, and have come to the conclusion that the act charged is a crime within the meaning of the constitution and laws of the United States. We cite, as authorities applicable to the question, the following: Commonwealth of Kentucky v. Dennison, 24 How. 66; In re Clark, 9 Wend. 212; State v. Buzine, 4 Harring. Del. 572; Walker Amer. Law, 511, sec. 187; 4 Chitty Bl. Com. 5; Bouv. Law Dict. title Crime; Hurd Hab. Corp, 595, et seq.; 2 Kent Com. 32, v. 1; 1 Bish. Crim Law, secs. 746 and 749." (Morton v. Skinner, 48 Ind. 123, A. D. 1874.)

"The governor of the state of Mississippi, in making the demand for Hibler, furnished to the governor of Texas a copy of the inditment against him for murder, 'certified as authenthic by the governor' of the state of Mississippi. This is the mode of authenticating the indictment as prescribed by the laws of the United States. (Rev. Stat. U. S. sec 5278.) This was recited in the warrant of the governor of the state of Texas ordering the arrest of Hibler, in accordance with what was held to be requisite by this court in the case of ex parte Thornton, 9 Tex. 635. Copies of these papers, the demand, the indictment, and the warrant of arrest, were all before the district court, and are now embraced in the record on appeal to this court. This attack upon the authority of the governor of the state of Texas to act in the premises must fall to the ground.

"The whole object of the amended petition is to assail the authority of the governor of the state of Texas to act, for the want of the proper evidence upon which to act. It is not alleged or pretended to be shown that there is in fact such indictment. It is not denied that there was such an indictment found against him; and no evidence was offered to prove that he had been acquitted or otherwise relieved from the charge. The evidence before the governor of Texas that there was a subsisting valid indictment against him for murder stood unimpeached; and that being established, his being found and arrested in this state establishing his position as a fugitive from justice in the meaning of the constitution and laws of the United States.

"There is nothing developed in this case which makes it necessary for this court to express any opinion as to the power of the court to look behind the action of the governor of Texas or that of Mississippi, and afford a remedy against illegal imprisonment, however it might be covered up under forms of law.

"In this case the law has been fully complied with, and nothing has been shown to indicate the use of its forms to accomplish an improper object or a perversion of justice.

"This provision of the constitution of the United States, requiring the surrender of fugitives from justice, is in the nature of a treaty stipulation between the states of the union, and it is equally binding upon each state and all of the officers thereof for its faithful execution, as though it was a part of the constitution of each state, whether congress had passed laws relating thereto or not. Those laws have been passed to establish uniformity in the mode of performing this

constitutional duty resting upon each state. When its execution is put into active operation by the proper authority of this state, the governor, based upon the authentic information and demand as required by law, it is equally obligatory upon all of the officers of this state as is the enforcement of any criminal proceeding under the constitution and laws of this state; and any undue means resorted to for the purpose of thwarting or preventing the due execution of this duty of the state are equally to be reprehended. This may be done by abusing and perverting the privileges of the writ of habeas corpus as well as by any other means. This is a great writ of liberty, by being left unshackled with forms and conditions in the mode of obtaining it. Therefore it can easily be obtained where there is no foundation for it in fact or in law.

"This would be an abuse of the privilege which, if frequently resorted to, might make it necessary to impose such limitations and restrictions upon the granting of it as would materially mar its efficacy. It is a privilege too dear to freedom to be endangered by intentional abuse of it by those who are connected with the administration of the laws. So it has been appreciated and acted on in times past, and it is to be hoped, will continue to be in the future

"These remarks are made to induce caution in the exercise of this high privilege, and a conscientious resort to it only to accomplssh its legitimate purposes, rather than to make any reflection upon the proceedings in this case, which have doubtless been instituted under the belief of counsel that it has been done in the assertion and for the procurement of a lawful right." (Hibler v. State, 43 Texas, A. D. 1875.)

"He is not a fugitive from justice in the sense of the statute, unless, at the time of his arrest, there be a pending prosecution against him for the alleged crime, in the state having jurisdiction of the offense." (Ex parte White 49 Cal 435, A. D. 1875.)

"The constitution of the United States does not assume to deal with the question, before the proper executive demand shall have been made, while upon the other hand the state provides for the detention of the fugitive for a reasonable length of time in advance of, and to afford an opportunity for the executive demand upon which the surrender is to be made. He said that the paramount constitutional duty of the state to make the surrender upon proper executive demand was in no wise in conflict with its reserved power to deal with the fugitive in the absence of such demand." (Ex parte Cubreth, 49 Cal. 437, A.D. 1875.)

"The petitioner, H. B. Titus, presents his position for a writ of habeas corpus, directed to the sheriff of the county of Kings, to the end that he may be discharged from the custody of such sheriff."

"The facts upon which the petitioner bases his demand for a discharge is as follows:

"On the 7th day of November the governor of the state of Arkansas commissioned the petitioner to present to the governor of the state of New York the requisition of the governor of Arkansas for the surrender of a fugitive from justice, from the state of Arkansas, named Augustine R. McDonald, together with a duly authenticated

copy of an indictment found against the said McDonald by the Grand Jury of Ashley county, Arkansas.'

"In pursuance of his commission and the instructions of the governor of the state of Arkansas, the petitioner as such agent, presented said requisition, together with said authenticated indictment, to the governor of the state of New York, who, thereupon, issued to the sheriff of the county of Kings his mandate directing the arrest of McDonald, and his delivery to the petitioner, the agent of the state of Arkansas, duly commissioned and authorized to receive said fugitive, in accordance with the laws of the United States in such case made and provided.

"The sheriff of Kings county on receipt of the mandate of the governor arrested McDonald for the purpose, of delivering him to the petitioner in accordance with the terms of the mandate; but before such delivery was made, the fugitive was released from the custody of the sheriff upon habeas corpus issued by a justice of the supreme court of the state of New York.

"After being so released McDonald brought an action for malicious prosecution against petitioner, and obtained from the supreme court of the state an order for his arrest, in pursuance whereof he is now held in custody by the sheriff of Kings county.

"Being so detained in custody, he presents his petition to this court, upon the ground that he is detained in custody by reason of acts, committed by him in pursuance of the laws of the United States, and which are justified by such laws.

"Notice of the application having been given to the attorneys for McDonald, at whose suit the petitioner is imprisoned, they have appeared, and in opposition to the petition, deny the jurisdiction of this court to issue the writ of habeas corpus, upon the ground that the acts of the petitioner, which were the foundation of the action against him, are not acts done in pursuance of any law of the United States, and the further ground that the indictment, presented to the governor of the state of New York and upon which he issued his mandate to the sheriff, does not charge any crime of which the Grand Jury of Ashley county, Arkansas, could take cognizance, whence it is concluded that all the proceedings toward the surrender of McDonald were void, and afford no justification for the petitioner and no foundation for the interposition of this court.

"By the constitution of the United States the whole subject of interstate extradition is remitted to the cognizance of the general government.

"This jurisdiction of the government of the United States is exclusive (Prigg v. Commonwealth of Penn. 16. Pet. 622.) The act of 1793, now § 5278 of the revised statutes of the United States, provides the method by which such extradition is to be accomplished.

"That statute authorizes the executive authority of any state from which a fugitive from justice may have fled, to demand his return of the executive authority of the state to which such person has fled, upon producing to such executive a copy of an indictment found, or an affidavit made before a magistrate of the state, charging

the person, demanded with having committed treason, felony or other crime, such indictment or affidavit to be certified as authentic by the governor or chief magistrate of the state from which the person so charged has fled.

"Upon receipt of the requisition and certified indictment, the executive authority of the state, to which such person has fled, is authorized to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority, making the demand, or to the agent of such authority, appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear.

"The petition and accompanying documents disclose plainly that the only acts charged upon the petitioner and because of which he is arrested, are acts performed by him as agent appointed by the executive of the state of Arkansas, in pursuance of the commission issued to him by such governor, which acts are those prescribed by the act of 1793 as above stated.

"The case of the petitioner, therefore, is that of a ministerial officer acting within the scope of an authority conferred upon him by the governor of a state by virtue of the provisions of the act of 1793, who being held in custody by reason of such acts, applies for his discharge from such custody by virtue of the provisions of law found in chap. 13, title 13, of the United States revised statutes.

"Those provisions of law make it the duty of the judges of the courts of the United States, within their respective jurisdictions, to grant writs of habeas corpus for the purpose of inquiring into the cause of restraint of liberty where a prisoner is in custody for an act done or omitted in pursuance of a law of the United States. (Sec. 753, U. S. R S.)

"The question, therefore, is whether the petitioner is in custody for acts intended to be covered by section 753 of the revised statutes of the United States.

"It is contended, in opposition to the petition, that acts performed in and about the surrender of fugitives from justice are not acts done in pursuance of the laws of the United States, but are the acts of a governor of a state, done in discharge of his duty to the state, and not otherwise.

"Reliance is placed upon the case of Commonwealth of Kentucky v. Dennison, 24 How. p. 66, for this position.

"But I do not find the position to be supported by the authority referred to, nor do I consider it tenable on principle.

"The case of Kentucky v. Dennison simply decides that the supreme court of the United States has no power to issue a mandamus to compel the goverhor to cause the surrender of a fugitive when demanded by the executive of the state from which he has fled.

"The question here raised could not arise in that case, for the reason that in that case the governor of Ohio refused to act at all.

"Here the governors respectively have acted, and the acts performed are those required by the laws of the United States to be performed.

"It seems clear that the authority exercised is an authority conferred by the laws of the United States, and by no other laws.

"The supreme court of the United States in Prigg v. Commonwealth of Pennsylvania, when speaking of the act of 1793, say:

"'As to the authority so conferred upon state magistrates, while a difference of opinion has existed, and may exist still, on the points in different states, whether state magistrates are bound to act under it, none is entertained by this court that state magistrates may, if they choose, exercise that authority, unless prohibited by state legislation.'

"So in Kentucky v. Dennison, where it was argued that the act of 1793 must be held to speak only to state authorities, and to leave its execution wholly to the authorities of the state themselves, and therefore to be void, the supreme court, maintaining the validity of the act, declares that the act makes it the duty of the state executive to cause a fugitive from justice to be delivered up, and that 'as the duty of the governor of the state where the fugitive was found is in such case merely ministerial, without the right to exercise either executive or judicial discretion, he could not lawfully issue a warrant to arrest an individual without a law of the state to authorize it.'

"There are no laws of the state to authorize the acts specified in the act of congress.

"The governors and their agents are compelled, therefore, to rely upon the statutes of the United States for authority to do the acts required thereby, and the statutes of the United States afford them justification.

"It seems impossible, therefore, to hold that when they so act they act otherwise than in pursuance of a law of the United States.

"In so acting they but discharge an absolute obligation created by a law of the United States, which they are bound to perform, and for which there is no other law. And their acts are none the less acts done in pursuance of a law of the United States, because, as decided in Kentucky v. Dennison, there is no power in the general government to use coercive measures to compel performance.

"The view of the scope of sec. 753 appears to be in harmony with the object of the statute, which plainly is intended to afford to all persons arrested for acts done in discharge of obligations to the United States, and arising under the constitution and laws thereof, a summary method of obtaining release from unjust imprisonment.

"Certainly those are entitled to such protection, and are clearly within the spirit of the act, who in conformity with a law of the United States exercise that portion of the delicate and important power in respect to fugitives from justice, granted by the constitution to the national government, which has been called into operation by the act of 1793, a power of necessity belonging to the national government, but which operates largely if not exclusively in the interest of harmony between the states.

"Entertaining these views, which find support in the case of Smith (3 McLean, 131) I am bound to hold that the petitioner is entitled to require of this court a writ of habeas corpus, to the end that an

inquiry be had into the causes of the restraint of his liberty. Prisoner discharged." (Re Titus, by Benedict, J., U. S. Dist. Court, E. D. N. Y., April, A. D. 1876; 8 Ben. 413.)

"Under the constitution of the United States and the act of congress, a state is bound to surrender a fugitive for whom a proper requisition has been issued by the governor of the sister state." * *

"We think, reference being had to the obligation imposed by the constitution of the United States, that the same rule is applicable to a proceeding under a requisition from the governor of another state as applies when the question is between a criminal proceeding initiated in this state and a civil action. In such case the interest of the private suitor who has caused a defendant to be arrested must yield to the paramonnt interest of the people of the state." (Ex parte Rosenblat, Cal. 51, 287, April, A. D. 1876.)

"It is argued that subdivision 2 of section 2 of article 4 of the constitution of the United States, which declares 'a person charged in any state with treason, felony or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime,' is simply declaratory of an obligation which one state owes to another under the federal constitution, and that it imposes no duty and confers no power upon the executive of the state within which the fugitive shall be found. Without legislation, then, it is claimed that the governor of this state had no power to act, and that the act of congress of February 12, 1793, which makes it the duty of the executive authority of the state to which the person charged with crime has fled, on the demand of the 'executive authority of any state in the union, or of either of the territories north-west or south of the river Ohio,' * * * 'to cause him or her to be arrested and secured, and notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear,' is unconstitutional and void, because congress has no power to impose duties upon the governor of any state; or, at most, that the act of congress aforesaid should be so construed as simply to authorize the executive of the state to initiate proceedings before the judiciary, in conformity with the state law of 1839 before referred to (chap. 350, Laws of 18 9). The court is not insensible to the force of reasoning sustaining this view, but the point has been so fully and entirely adjudged the other way that original reasoning must end.

"In the case of Prigg vs. The Commonwealth of Pennsylvania, 16 Peters, 539, the supreme court of the United States held that the act of 1793 was constitutional, and that a state can pass no law hindering or obstructing its execution. The main opinion of the court is pronounced by Mr. justice Story, and is concurred in by a majority of the court. That opinion holds that congress alone has power to legislate upon the subject, and that state laws, even when in aid of the provision of the constitution, are void. Whilst some of the other judges do not go to this extent, yet they all agree that the act of the

state of Pennsylvania, under which Prigg was indicted, tried and convicted, was unconstitutional and void, because in conflict with the federal constitution and the act of 1793.

"In Commonwealth of Kentucky vs. Dennison, governor of the state of Ohio, 24 How., 66, the validity of the act of 1793 was again before the same tribunal. It was an application by the state of Kentucky 'for a rule on the governor of Ohio to show cause why a mandamus should not be issued by the court commanding him to cause Willis Lago, a fugitive from justice, to be delivered up, to be removed to the state of Kentucky, having jurisdiction of the crime with which he is charged.' The matter was most fully and elaborately argued, and the opinion of the court, in which all the judges concur, is delivered by chief justice Taney. In a most clear and able argument he holds that whilst the constitution of the United States does not specify upon what officer of a state the demand for the fugitive must be made, yet for the reasons which he gives (see pages 102, 103), 'the conclusion is irresistible' that the clause in the constitution aforesaid 'gives the right to the executive authority of the state to demand the fugitive from the executive authority of the state in which he is to be found; that the right given to demand implies that it is an absolute right, and it follows that there must be a correlative obligation to deliver, without any reference to the character of the crime charged, or to the policy or laws of the state to which the fugitive has fled.' He further holds that congress had full power to legislate upon the question, and that the act of 1793 is constitutional and valid; but, whilst it is the clear moral duty of the governor of the state upon which the demand for the fugitive is made to comply with such demand, yet 'the act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the executive of the state; nor is there any clause or provision in the constitution which arms the government of the United States with this power.' The learned judge, after further arguing that the executive of a state is morally and justly bound to comply with the demand, again expressly declares: 'The performance of this duty, however, is left to depend upon the fidelity of the state executive to the compact entered into with the other states when it adopted the constitution of the United States and became a member of the union. It was so left by the constitution, and, necessarily, so left by the act of 1793.' And the opinion concludes thus: 'But if the governor of Ohio refuses to discharge this duty, there is no power delegated to the general government, either through the judicial department or any other department, to use any coercive means to compel him. And upon this ground the motion for the mandamus must be overruled.

"As the governor of this state has, in the case before us, exercised the power conferred upon him by the federal constitution and the act of congress, the conclusion from the foregoing cases manifestly is, that the act which he has assumed to perform is not void for want of power; but, on the contrary, in a proper case, both the constitution and the law of congress imposed upon him a grave duty which every moral reason required him to perform.

"In the examination of the other points made by the counsel for the creditors, in opposition to the discharge of Briscoe, it is objected on the part of the state of Georgia that as the power and duty of extradition is conferred upon the governor of a state, that when the propriety and right of such extradition have been determined by him, his judgment cannot be reviewed by the judiciary. This point now urged upon the present application has once before been made by the governor himself, in the matter of Nathan Ullman, in these words: 'I deny, with great respect, the right of the court to issue said writ of certiorari to me, or to review, directly, my action in discharging the duty imposed upon me by the constitution of the United States with respect to the surrender of fugitives from justice.' As the question is an important one, and has been respectfully made, it becomes us to examine it with the care due to its importance and the high official station of the party making it.

"If the position now taken had not been judicially overthrown, as we shall presently show it has been, whilst intending no disrespect to the governor of this state, we should be constrained to assert the power and duty of the court to examine and inquire into the cause of the detention of a prisoner even though the warrant which detains him is issued by the governor of the state, as he claims, under the power conferred upon him by the national law. It has been truly said (Bouvier's Law Dictionary, vol. 1, p. 651) of the writ of habeas corpus: 'This is the most famous writ in the law, and having for many centuries been employed to remove illegal restraint upon personal liberty, no matter by what power imposed, it is often called the great writ of liberty.' The habeas corpus act, 3 R. S., 6th ed., 875, sec. 35, expressly enacts the common-law power of the writ and declares: 'Every person committed, detained, confined or restrained of his liberty within this state for any criminal or supposed criminal matter, or under any pretense whatever, except in the cases in the next section specified, may prosecute a writ of habeas corpus or of certiorari, according to the provisions of this article, to inquire into the cause of such imprisonment or restraint.' As the next section does not take the case of a person sought to be extradited by the mandate of the governor out of the operation of the statute, it necessarily follows that the court has power to inquire and must 'inquire into the cause of such imprisonment or restraint.' The executive is not infallible. He may err and issue his warrant when he ought not to issue it, and if the citizen has no right to prosecute the writ, but must submit to the executive order, then it is clear that we have one officer in a state organized under a republican form of government who can hold at pleasure and remove at his will beyond the jurisdiction of the state every citizen, and whose action cannot be questioned or reviewed. This is simple tyranny, and the statement of the proposition would, we are certain, cause the present executive, as well as the court, to reject it as entirely unsound.

"We are fortunately, however, not to dissent from the opinion of the chief executive of the state upon our own judgment. In the matter of Manchester, 5 Cal. 237, it was held: 'The judiciary have

jurisdiction by habeas corpus to investigate cases where a party is arrested as a fugitive from justice, escaped from another state. The courts possess no power to control the executive discretion in surrendering fugitives from justice, nor can they compel a surrender in such case, yet the executive having acted, that discretion may be examined into in every case when the liberty of the subject is involved.' The court of appeals of this state, in the matter of Lawrence, 56 N. Y. 182, has decided the very question, and there is, consequently, no room for argument. That court has declared: 'The courts have jurisdiction to investigate by writ of habeas corpus, and to examine the grounds upon which the executive warrant for the apprehension of an alleged fugitive from justice from another state is issued; and, in case the papers are defective and insufficient, to discharge the prisoner;'" (Re Briscoe, 51 How. Pr. 422, A. D. 1876.)

"If the executive of the demanding state had the authority, through his agent, to remove the fugitive from the state of refuge, in opposition to the will of its executive, he would have the right to send an army to enforce the authority, and no one is bold enough to claim that this may be done. The fact is the warrant of extradition is, in substance, a consent to remove the alleged criminal beyond our territorial limits, and there can be no removal without a valid warrant. Botts v. Williams, 17 B. Mon. 687. An independent government does not hesitate to arrest the removal of a fugitive at any time before he is taken beyond the nation's territorial limits, if it be discovered the case is not clearly within the extradition treaty. Re Windsor, 6 B. & S, 118 E. C. L.) 522; 3 Whart., C. L., sec. 2973. The governor of a state has precisely the same power, if he discovers that the requisition is a forgery, or that the case is one not intended to be provided for in the constitutional provision; and if he exercises the power cautiously, and only in cases to which I have referred, or in others of a like character, much may be done to prevent the abuse, without impairing the efficacy of extradition proceedings." (Work v. Carrington, 34 Ohio, 64, A. D. 1867.)

"By the constitution of the United States, 'a person charged in any state with treason, felony or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.' Const. U. S., art. 4, sec. 2. Congress has enacted that when the executive authority of any state shall demand any person, as a fugitive from justice, of the executive authority of the state to which he has fled, and shall produce the copy of an indictment found, or an affidavit made before a magistrate, charging the person demanded with having committed treason, felony or other crime, and certified as authentic by the governor of the state fled from, it shall be the duty of the executive authority of the state fled to, to cause him to be arrested and delivered up to the agent of the executive authority making the demand. U. S. St. Feb. 12, 1793, sec. 1; U. S. Rev. Sts., sec. 5278. The statutes of the commonwealth provide that such demand shall be accom-

panied by sworn evidence that the party charged is a fugitive from justice, and by a duly certified copy of an indictment, or a duly attested copy of a complaint made before a court or magistrate authorized to receive the same and supported by affidavit, and that the person arrested shall be allowed opportunity to apply for a writ of habeas corpus. Gen. Sts. c. 177, secs. 1-4. The warrant of the governor of the commonwealth is prima facie evidence, at least, that all necessary legal prerequisites have been complied with, and, if the previous proceedings appear to be regular, is conclusive evidence of the right to remove the prisoner to the state from which he fled. Commonwealth v. Hall, 9 Gray, 262; Kingsbury's case, 106 Mass. 223; Brown's case, 112 Mass. 409; Taylor v. Taintor, 16 Wall. 366, 374.

"The only objection made in this case to the validity of the proceedings is that the indictment does not charge any crime under the laws of Vermont. But by the statutes of Vermont, produced at the argument in accordance with the leave reserved in the report, it appears that obtaining goods by false pretences is a punishable crime in that state; and the indictment substantially sets forth an obtaining of goods by false pretences. When an indictment appears to have been returned by a grand jury, and is certified as authentic by the governor of the other state, and substantially charges a crime, this court cannot on habeas corpus discharge the prisoner because of formal defects in the indictment; but the sufficiency of the charge as a matter of technical pleading is to be tried and determined in the state in which the indictment was found. Re Voorhees, 3 Vroom. 141; Re Greenough, 31 Vt 279; Re Clark, 9 Wend. 212. As this ground is conclusive against the petitioner, it is unnecessary to consider whether the warrant of the governor of this commonwealth, issued upon the demand and certificate of the governor of Vermont, would preclude the court from inquiring and determining whether the indictment was defective in substance.

"In the cases cited at bar, in which the prisoner was discharged, there was no indictment, but only an ex parte affidavit, which, upon inspection, did not distinctly charge any crime. In ex parte Smith, 3 McLean, 121, the affidavit merely alleged that the deponent at a certain time and place in Missouri 'was shot with intent to kill, and that his life was despaired of for several days; and that he believes, and has good reason to believe, from evidence and information now in his possession, that Joseph Smith, commonly called the Mormon Prophet, was accessory before the fact of the intended murder; and that the said Smith is a citizen or resident of the state of Illinois;' and did not otherwise allege that a crime had been committed, or that Smith was in Missouri at the time of its commission, or that he was a fugitive from justice. In People v. Brady, 56 N. Y. 182, the affidavit charged a conspiracy to obtain, and an actual obtaining of property in Michigan by 'divers false pretences,' without setting out the pretences, or alleging that the end or the means were unlawful by the laws of that state. In Manchester's case, 5 Cal. 237, on the other hand, an affidavit which set forth the crimes of forgery and of uttering forged notes, without the exactness necessary to be observed in an indictment, was

held to be sufficient. See also Re Farez, 7 Blatchf. C. C. 34, 345, 491. Prisoner remanded" (Ex parte Davis, 122 Mass. 324, A. D. 1877.)

"If one of the federal courts or judge thereof, has the jurisdiction to issue a writ of habeas corpus and hear and determine the same, the power so to do is conferred by the section just quoted. And if I had the lawful right to issue the writ in this case and to hear the cause and determine it on its merits, that authority must be conferred by by the second clause of the section which authorizes the issuing of the writ, where the petitioner 'is in custody for an act done or omitted in pursuance of a law of the United States.'

"The petition or complaint expressly alleges that the relators were indicted and in custody, solely for acts done and committed under a law of the United States.

"And it is conceded by the counsel for the relators that unless the acts charged against the relators were required or permitted by some act of congress, so as to bring the case within the provision of the section last quoted, they must be remanded to the sheriff of Lancaster county, to be proceeded against for the crime with which they stand charged.

"There can no longer be any reasonable doubt about the right and jurisdiction of the federal courts and judges to issue writs of habeas corpus and to hear and determine questions arising thereon, and to discharge a petitioner from custody when imprisoned for acts required or permitted by an act of congress, or done in connection with the execution of process issued from the federal courts, notwithstanding the petitioner may be in custody under the state law, or whether held on indictment or otherwise, for such acts or commissions.

"The federal courts and judges have, in numerous instances, exercised and upheld the jurisdiction invoked in such cases.

"And the mere question of jurisdiction would be regarded as no longer debatable in the federal courts. See U. S. ex rel Roberts. v. Jailor of Fayette County, 2 Abbotts' U. S. Rep. 265; Ex parte Rollison, U. S. Marshal, 1st Bond's Rep. 39; Ex parte Jenkins et al, 2d Wallace Jr. Rep. 521; In re Thomas H. Weill, 8 Blatchford, 156; Ex parte Jos Smith, 3 McLean, 121.

"I now pass to the consideration of the great question involved in this inquiry. And I fully concede the fact that it is not free from embarrassment.

"I refer, of course, to the apparent conflict of jurisdiction between the national and state tribunals.

"The relators state in their complaint, and counsel earnestly contend in their argument, that Blair was arrested in and removed from the state of Nebraska under and in pursuance of the constitution and laws of the United States.

"The constitutional provision on the subject of extradition is found in the second subdivision of sec. 2 of art. 4, and is as follows:

"'A person charged in any state with treason, felony or other crime, who shall flee from justice and be found in another state, shall, on the demand of the executive authority of the state from which he fled, be delivered up to be returned to the state having jurisdiction of the crime.'

"At first view it might seem that this provision of the constitution is plain and explicit enough to accomplish the object evidently designed by it, without the aid of the legislature to carry it into effect.

"But it had not long been in operation before grave difficulties were encountered in undertaking to enforce it.

"It is known that bad feeling existed, and that much indignation was expressed when the governor of Virginia refused to surrender a fugitive from justice on the requisition of the governor of Pennsylvania.

"It was claimed that no palliating excuse could possibly exist for such a refusal.

"But a strict constructionist in that day as well as the present, could probably find sufficient justification on which to base a refusal on which to surrender.

"The refusal of the governor of Virginia to surrender the fugitive was regarded by President Washington as of sufficient importance to justify him in sending a special message to congress on the subject of extradition.

"This action on the part of the president finally led to the passage of an act of congress on the 12th of February, 1793, which has since regulated the demand for and surrender of fugitives from justice.

"The substance of that act, so far as it relates to the subject under consideration, is incorporated into and forms sections 5278 and 5279 of the revised statutes of the United States, and is as follows:

"Sec. 5278. Whenever the executive authority of any state or territory demand any person as a fugitive from justice of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled, to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear.

"If no such agent appears within six months from the time of arrest, the prisoner may be discharged.

"All costs or expenses incurred in the apprehending, securing and transmitting such fugitive to the state or territory making such demand shall be paid by such state or territory.

"Sec. 5279. Any agent so appointed who receives the fugitive into his custody, shall be empowered to transport him to the state or territory from which he has fled. And every person who by force sets at liberty or rescues the fugitive from such agent while so transporting him, shall be fined not more than five hundred dollars or imprisoned not more than one year.

"In the great case of Prigg v. the Commonwealth of Pennsylvania,

reported in the 16th Peters, 608, the court carefully considered the whole subject of the surrender of fugitives from justice in connection with the surrender and return of fugitives from labor.

"A majority of the court held in that case that these subjects were under the exclusive jurisdiction of congress, and that the states legislature possessed no rightful jurisdiction over them.

"In this case it appears that Prigg had been indicted and convicted for kidnapping a Margaret Morgan, in the state of Pennsylvania.

"The supreme court of that state affirmed the judgment, and directed the sentence to be carried into execution.

"The case was removed to the supreme court of the United States, when the judgment of the supreme court of Pennsylvania was reviewed and reversed, for the reason that Prigg was justified in removing the said Morgan from the state, she being a slave.

"The court very plainly held that the right to remove a fugitive slave as well as fugitives from justice, from one state to another, existed under the constitution and laws of the United States, and that state legislation could not be permitted to interfere with the exercise of that right; and that the courts of a state could not properly punish a person for what was done thereunder, so the terms of the law were not transgressed.

"Prigg had been convicted under a law of Pennsylvania for doing the very thing authorized and permitted by the constitution and laws of the United States.

"The conviction could not be sustained for that reason, and he was discharged.

"In the case of the governor of Kentucky v. the governor of Ohio, reported in the 24th of Howard, 66, it is held that 'congress may authorize a particular state officer to perform a particular duty, but if he declines to do so it does not follow that he may be coerced or punished for his refusal'

"If, then, congress can lawfully authorize a state officer to do a 'particular thing,' does it need any argument to show that the state officer cannot be punished for doing that particular thing so authorized?

"The constitution of the United States and the laws made in pursuance thereof are the supreme laws of the land, and anything in conflict with either must yield to their superior force and authority.

"The constitutional provision quoted, and also the act of congress authorizes the governor of a state from which a fugitive from justice has fled, to demand his return from the governor of the state where the fugitive is found.

"This may be done when the commission of the crime is shown by indictment, or by a proper affidavit, one of which is to accompany the requisition.

"The governor may appoint a messenger, or agent, to receive the fugitive and convey him to the state from which he fled.

"The governor of the state on whom a requisition is made is authorized to cause the arrest of the fugitive and deliver him to the messenger or agent of the other state.

"All this, and more, is specially provided for and authorized by the extradition law.

"The papers in the case under consideration were all regular and valid.

"The governor of Illinois issued a lawful requisition for Blair, and Bull was appointed messenger on behalf of the state of Illinois, to receive him.

"The governor of Nebraska issued his lawful warrant on which Blair was arrested and delivered to the messenger from Illinois.

"These were 'officers of states' and each one of them did a particular thing in connection with the extradition of Blair; and each one of the 'particular things' so done by each and every one of these 'state officers' they were specially and specifically authorized to do by the highest authority in this land.

"It would seem from this reasoning then, that the relators are actually 'in custody for an act done or committed in pursuance of a law of the United States.'

"This would give them what seems to me to be a clear and undoubted right to the writ.

"And unless there is some potent reason for refusing it, they are entitled to a discharge.

"In ex parte Joseph Smith (the Mormon prophet) 3 McLean 121 a case not unlike the present one in some respects, the United States circuit court of Illinois held that a messenger who was authorized by the governor of Missouri to receive Smith from the governor of Illinois, was acting under a law of the United States, and that Smith was in custody of such messenger under a law of the United States.

"It was nowhere claimed that Smith had violated any such law, or was in custody for, or charged with such violation.

"He was simply charged with being an accessory to the crime of assault with intent to kill—with simply violating the criminal laws of the state of Missouri.

"Smith was arrested by the sheriff of Sangamon county, on the warrant of the governor of the state of Illinois, and was held by him for the purposes of extradition, when the writ of habeas corpus issued.

"Yet a hearing was had which led to the discharge of Smith; and and I think the only ground on which the jurisdiction of the court could attach in this case was, that Smith was in custody under the provisions of a law of the United States, and that the sheriff who held him on the governor's warrant was acting under the provision of the same law.

"Again, in a case before referred to 2 Abbott, 265, it was held by judge Ballard to be 'immaterial whether the petitioner is held under state or federal process.

"If he is confined for an act done in pursuance of a law of the United States or of a process of any judge or court thereof, he is entitled to a discharge.'

"In this case the relator was in custody of a state officer on a charge of murder.

"But the testimony presented at the hearing of the complaint showed that the relator was a United States marshal, who had in his hands for service a writ issued by a United States circuit court commissioner, and whilst he was endeavoring to serve it he was resisted, and killed his assailant, the party for whom the writ is issued.

"The learned judge discharged the relator from custody of the state officer, notwithstanding the process on which he was held was regular and valid on its face.

"In ex parte Jenkins (2nd Wallace jr., 521) the same questions were raised, and decided in the same way.

"It appeared that Jenkins was a deputy marshal, and undertook to arrest a fugitive, slave, in doing which a serious affray occurred, in which Jenkins participated, causing his arrest under a criminal law of the state of Pennsylvania

"The late Mr. justice Grier, of the supreme court, who heard this case, discharged the relator, because he was 'an officer of the United States, in confinement for acts done in pursuance of a law of the United States, and under process from a judge of the same, and had not exceeded the exigency of the process under which he acted.'

"This same Jenkins was soon after arrested on the charge of assault with attempt to kill, and whilst he was in custody of the state officer on this charge a writ of habeas corpus was issued by judge Kane.

"On the hearing it appeared that Jenkins had been indicted under the state law for assault with intent to kill.

"But the acts charged were alleged to have been committed under an act of congress which justified the relator in the premises, and the judge proceeded to hear the complaint on its merits, notwithstanding the relator had been indicted in the state court, and finally discharged him from custody.

"Other cases were cited by counsel directly on the question discussed, but enough have been referred to for present purposes. * * Prisoners discharged. (U. S. ex rel. Bull & Turtle v. McClay. By Dundy Judge, U. S. Dist. Court, Nebraska, February, A. D. 1877. 23 Int. Rev Rec. 80.)

"The relations in which the states stood to each other at the time of the formation of the constitution, and the relations which that constitution created between them, as known and understood at the time of the passage of the act, make it not impossible nor unreasonable to suppose that the warrant of the governor should on this question of the fact and sufficiency of the charge, be made within the intention of congress conclusive, even though the effect of it is that the party should, when arrested on the warrant, be deprived of the opportunity to contest the charge on habeas corpus in the state in which he is arrested * *

"I think that the recital of the warrant was intended by congress to be conclusive as to the charge of crime made against the alleged fugitive, and that the refusal of governor Robinson to furnish to the petitioner the requisition and accompanying copy of indictment for the purpose of the proposed review of this decision by this court was in entire accordance with the proper view of his official duty under the act of congress in question. * *

"Perhaps the only and proper remedy of a party arrested under a warrant in such a case is to apply to the governor for a revocation of the warrant." (Leary's case, 6 Abbott's new cases, 63 by Choate, J., U. S. dist. court, southern dist. N. Y., Jan., A. D. 1879.)

"The recitals in a warrant of the governor of this state for the arrest of a fugitive from the justice of another state, are to be taken, at least prima facie, as true.

"A return, therefore, to a writ of habeas corpus, setting forth such a warrant, which contains recitals of facts necessary to confer authority under the constitution and laws of the United States to issue it, is a sufficient justification for holding the prisoner, without producing the papers or evidence on which the governor acted." (People ex rel. v. Pinkerton, 77 N. Y. 245, May, A. D. 1879.)

In the District Court of the United States for the District of California.

Ex parte Hoyle, habeas corpus. April 16, 1880.

Alfred Clarke and C. J. Swift, for the state of Georgia.

J. W. Winans, for respondent.

Opinion by Hoffman, J..

* * * "I do not doubt myself that if it shall be made to appear to the court at Los Angeles that this party is held under the authority of the United States, or under color of that authority, that they will say that they had no power to proceed further. The exercise of that authority can only be examined into by the tribunals of the sovereign whose authority is exercised. I hope they will not disregard the emphatic decision of the supreme court.

"*The supreme court have, in several cases, gone so far as to advise the marshal holding a person in custody, that he should disregard a writ of habeas corpus, or any warrant from a state court, but should return the facts to the court without producing the party, and should resist any attempt on the part of the state court to take out of his custody any prisoner held under the laws and by authority of the United States.* The supreme court have gone so far as to hold that the state courts have no right to inquire into the legality of the enlistment or detention of a soldier or a sailor, and the circumstances of their right to be discharged can only be decided by a United States court. I take it for granted, therefore, when it is made to appear to that court that this man is held under the authority of the United States, that they will recognize the principles which have been laid down by the decisions of the supreme court of the United States, *and will desist from any further action in the matter.*

"I do not see that it has yet been made to appear that the prisoner is held under the authority of the laws of the United States. The preliminary warrant under which he was arrested to await the requisition of the governor of Georgia, is a warrant under the laws of this state. The act of congress confers no power upon any officer to issue such a warrant. It comes into activity only where the governor of the state shall have pursuant to the act, issued his warrant of ex-

tradition. At present this man is held for embezzlement under the state of California, an embezzlement, which it is admitted, was not committed here, but he is held under authority of our penal code, to arrest and hold a man awaiting the requisition of the governor. *If the court, contrary to expectation, goes behind the fact, when it is made to appear that he is held by the authority of the United States, it will be time enough to consider then what remedy the agents of the state of Georgia have. If they obtain the custody of the prisoner and claim to hold him, under the governor's warrants, under the act of congress, and he should be discharged by the state court, I do not say, then, that this court might not then have power to interfere.*

"The better way, perhaps, will be to exhaust all remedy furnished by the state court, and by a writ of prohibition to endeavor to restrain the superior court from usurping jurisdiction to discharge a prisoner held under the laws of the United States. At present this man does not appear to be held by virtue of any authority derived from the United States.

"The sheriff's return is that he holds him under a preliminary warrant issued under the laws of this state, and under the order of the court of this state, issued under a writ of habeas corpus. It was plainly the right and duty of the state court to examine into the authority by which he was held. They are in the exercise of their undoubted jurisdiction in inquiring into the cause of his imprisonment. I do not perceive that as yet it can be made to appear that he is held under the governor's warrant.

"The agents of the state of Georgia, whom that warrant empowers to take and hold the prisoner, have not succeeded in obtaining possession, and do not now hold him. *When a claim to his custody shall be set up under that warrant, it is to be presumed that the state court will recognize the authority so claimed is under the constitution and laws of the United States precisely as heretofore in the case of a fugitive slave, and that the regularity and propriety of its exercise can only be inquired into in the national tribunal.*

"I decide this matter thus summarily, not because I desire to evade the exercise of any jurisdiction which this court may possess, but because the sheriff stands between two fires. He is not learned in the law. His official duty is to obey the orders of his immediate superiors. He is directed to do one thing by one court and another thing by another court. I relieve him of a divided duty between which he is at his peril compelled to elect, and is placed in a dilemma from which he cannot escape without being in contempt of one court or the other. *If it should at any time appear to the state court that this man is held under warrant issued by the governor of the state, under the authority of the constitution and laws of the United States, it is to be presumed that that court will desist from any interference with the execution of those laws.*

"Until such an authority is attempted to be exercisd, it appears to me to be premature for this court to command the sheriff to bring the prisoner before it, and to enter into an inquiry founded upon the hypothesis that the state court is not going to obey the paramount law of the land.

"Now with regard to the purely technical question first adverted to, I think it open to grave doubt, whether under the narrow and restricted terms by which jurisdiction in cases of habeas corpus is conferred, whether the writ can be used to transfer a prisoner contrary to his wishes, and on the application of parties claiming his custody, from the custody of the person holding him to those who claim him. To apply the writ to such a purpose the language of the statute must receive a very liberal construction. On this point, however, I express no opinion. It will arise when the agents of the state of Georgia have executed the warrant of the governor, and obtained possession of the prisoner, and an application to discharge him is made to the state tribunal.

"*If he shall be liberated from the custody of the sheriff, I see no reason why the agents of the state of Georgia cannot take him under warrant of the governor.* And, if he then sues out a writ of habeas corpus to relieve him of that restraint, it may be that this court could interfere; *but that question will only arise when the state courts, being advised that he is held under a warrant issued by the governor, shall proceed to inquire into the legality of his arrest.* My judgment now is that the prisoner be remanded to the custody of the sheriff." (Re Hoyle, 1 Criminal Law Magazine 472, A. D. 1880.)

"And hence we have held that where the preliminary papers upon which a warrant of extradition has been granted are produced, and are before us, it is our right and our duty to examine them, and judge and determine, when our process is invoked, whether they are sufficient under the law, to justify the warrant of extradition. People ex rel. Lawrence v. Brady, 56 N. Y. 182. Our ruling in this respect has not escaped criticism (Leary's case, 6 Abb. N. C 44); but an opposite conclusion, which would make the determination of the executive final, even though the papers produced clearly showed that the essential preliminaries of the law were unfulfilled, does not yet commend itself to our judgment.

"Where, however, the papers upon which the warrant is founded are not produced, but are withheld by the executive, in the exercise of official discretion and authority, we can look only to the warrant itself and its recitals for the evidence that the essential conditions of its issue have been fulfilled. People ex rel Draper v. Pinkerton, 77 N. Y. 245." (People ex rel. v. Donahue, 84 N. Y. 442, March, A. D 1881.)

In support of point TWO, viz: *That the superior court has and had no jurisdiction, power or authority to compel plaintiff to produce his prisoner, or to commit plaintiff for refusing to produce him, and that the decision of the supreme court remanding the plaintiff is manifest error.* The plaintiff cites the following cases:

"The proceedings of the justice appear to be regular under this act; and though this court hath not denied the benefit of the writ of habeas corpus, yet it is conceived that it possesses no jurisdiction in the present

case. The powers given to the justice and master are derived from the law of the United States, and whether exercised properly or improperly, by the one or the other, is not a subject for the investigation of *this court.*" (State v. Plime, etc., T. U. P., Chart 142, Ga, 1807.)

"The whole proceeding is under the constitution and laws of the United States. I am, therefore, decidedly of opinion that this court has no right to interfere in the present case" (Ex parte Roberts, 2 Hall's Law Journal, 192, Maryland, A. D. 1809.)

"The cause of the detention of the prisoner being fully and distinctly detailed in the affidavit, an important question, arising upon the motion is, whether this court has jurisdiction in the case.

"A similar application was made to this court in July term, 1799, in the case of Husted, who was stated to be an enlisted soldier, (1 Johns. cases, 136), and the motion was denied; but the court gave no opinion on the question of jurisdiction. The only case I have met with, in which this question has been considered, is that of Emanuel Roberts, which arose in Maryland in 1809. 2 Hall's Law Journal, 192. The habeas corpus was awarded in that case upon affidavit that the person had been seized and forcibly carried on board of a public vessel belonging to the United States, then lying in the harbor of Baltimore, and where he was detained. By the return of the writ it appeared that Roberts had voluntarily enlisted in the naval service of the United States; and the court declared it to be a proceeding under the authority of the United States, and that they had no right to interfere, although it was alleged that the party was only sixteen years of age, and was drunk when enlisted.

"As far as the case goes, it is an authority against the jurisdiction of the state courts; and yet Nicholson, Ch. J., in delivering the opinion of the court, seemed to consider that there might be cases in which it would be the duty of the state courts to interfere, even though the imprisonment was under the authority of the United States.

"As far as I have reflected upon the question, I have been led to conclude that our jurisdiction does not depend upon the greater or less degree of aggravation in the case, and that we have either no jurisdiction at all or a completely concurrent jurisdiction, in granting relief upon habeas corpus, in all cases of unlawful imprisonment by an officer of the United States, under color or by pretext of the authority of the United States.

"The present case being one of an enlistment under color of the authority of the United States, and by an officer of the government, the federal courts have complete and perfect jurisdiction of the case; and there is no need of the jurisdiction or interference of the state courts; nor does it appear to me to be fit that the state courts should be inquiring into the abuse of the exercise of the authority of the general government. Nevertheless cases may be supposed of the abuse of power by the civil and military officers of the government of the United States; but the courts of the United States have competent authority to correct all such abuses, and they are bound to exercise that authority. The responsibility is with them, not with us; and we have no reason to doubt of their readiness as well as ability, to

correct and punish every abuse of power under that government. The judicial power of the United States is commensurate with every case arising under the laws of the union, and the act of congress (Laws of U. S. vol. 1, 53, 55) gives the federal courts, exclusively of the courts of the general states, cognizance of all crimes and offences, cognizable under the authority of the United States. If the soldier, in the present case, be detained against his will, knowing him to be an infant, or if, though an adult, he has been compelled to enlist by duress or violence, it is a public offence, but an offence of which this court cannot take cognizance. An abuse of the authority of the United States is an offence against the United States, and exclusively cognizable in their courts. When the state courts have not jurisdiction over the whole subject matter of the imprisonment, and when the federal courts have such jurisdiction, by indictment as well as by habeas corpus, there appears to me to be a manifest want of jurisdiction over the case.

"The want of jurisdiction over the offence of unlawful imprisonment by indictment, seems equally to exclude the collateral remedy by habeas corpus, except where a jurisdiction in the latter case is specially conferred The writ of habeas corpus, as applied to such purposes, is a prerogative writ, and the issuing of it in term time rests in sound legal discretion. There appears to be an incongruity in such a maimed jurisdiction as this court would possess of having a right to deliver from an illegal imprisonment and yet no right to call to an account the authors of such illegality and oppression. The general principle is, that if a court has no jurisdiction of the principal question, it has none of its consequences and incidents." (By Kent, C. J., Ex parte Ferguson, 2 Johns. 239, A. D. 1812.)

"If there be cases in which the state courts have jurisdiction of the principal matter, I am of opinion they may entertain an incidental or collateral question; they may, therefore, in such cases, release under a writ of habeas corpus, on the ground of illegal confinement, because the prosecution is groundless, or for other sufficient cause. This authority may, perhaps, be exercised by courts having a superintending power, though they may not have jurisdiction for the purpose of trial, for they have authority to restrain and annul the acts of inferior jurisdictions But in a case like the present, where the state courts in no case, and under no circumstances, can take cognizance of the offence charged, to punish or acquit, and where the functionary appealed to is himself, in all questions under the laws of the United States, subject to the control of their high tribunals, all pretence of jurisdiction seems to vanish. I cannot, nor can all the judicial authority of the state, discharge a defendant in a civil suit who has been held to bail in the courts of the United States, however illegal the arrest may be, because I have no jurisdiction; and yet it is seriously imagined that I have at my chambers, authority to take their criminal jurisdiction, which is by their laws expressly exclusive, out of the hands of their tribunals, and to determine the acts of the national legislature unconstitutional and void." (Ex parte Rhodes, 12 Niles W. Reg. 264; 2 Wheelers Crim. Cases 567, A. D. 1816.)

"Now in the present instance, the proceeding before Judge Armstrong, and the certificate granted by him, are in exact conformity to the act of congress. That certificate therefore, was a legal warrant to remove the plaintiff to the state of Maryland. But this writ of *homine replegiando* is to issue from a state court, what is its effect, but to arrest the warrant of Judge Armstrong, and thus defeat the constitution and law of the United States? The constitution and law say, that the master may remove his slave by virtue of the judge's certificate; but the court says that he shall not remove him. It appears to us, that this is the plain state of the matter, and that the writ has been issued in violation of the constitution of the United States. We are, therefore, of opinion that it should be quashed. Writ quashed." (Wright alias Hall v. Deacon, 5 Sergt. & Rawle, 64, A. D. 1819.)

"As a matter of policy, I am opposed to this blending of jurisdictions. Whatever ingenious theories may be broached, in which the government of the United States is made a part of that of South Carolina, and the government of South Carolina is made part of that of the United States, to a plain understanding it would appear, that the departments of the two, and their various functions are entirely separate and distinct, having concern with, and relation to, each its particular and separate class of subjects, interests, and duties. I consider it a wise policy, to prevent conflict, and preserve harmony, that each should be kept moving in its own orbit. * *

"The judical power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority. * * In remarking on this article formerly, I laid down the proposition, that the judicial power of a state, in its original constitution, is co-extensive with the legislative, and extends to all subjects of controversy which can arise under the laws. Without any specific enumeration, therefore, of the judicial power in the constitution, the courts of the United States, from the very nature of their office and duty, would have taken cognizance of all those cases which are embraced in the three first clauses; because they are arising, or which would arise, under the limited legislation of a government of limited powers. And of all those classes of cases, their jurisdiction is exclusive. * *

"The judicial power must be general or limited, according to the scope and objects of the government; in a word, it must be fully and exactly commensurate with that of the legislature. It cannot by any terms of language be made to extend beyond the legislative power, for such excess would be inconsistent with its nature The clear, well defined separation between the legislative function of the general government and that of the states, at once presents the principle in strong relief. The classes of subjects to which the legislation of congress may extend, are eumerated in the constitution. The jurisdiction of the federal courts extends to all cases arising under laws passed there, and to some others expressly mentioned. * *

"I have been the more emboldened to urge these views, because they have met the approbation of the ablest courts in the other states

of the union, and because the result produces an uniformity, which is of the utmost importance, on a question of great interest. The effect will be to preserve unimpaired those constitutional barriers between the departments of the federal and of the state governments, which are essential to their harmonious operation. Let each be restrained, strictly, within the limits which the constitution has prescribed, and be withheld from encroaching on the jurisdiction of the other, and both will go forward affording adequate relief, within their proper spheres; and extending and perpetuating the blessings of order and good government, to the whole people and through all time." (By Earle J. concurring Johnson, chancellor; Gantt, Richardson, Evans & Buttler, Justices. State v. McBride, Rice 400, May A. D. 1839.)

"Had the state judge power to issue a writ of habeas corpus in this case.? * *

"I have no hesitancy in saying that the judicial officers of a state, under its own laws, in a case where an unlawful imprisonment or detention is shown by one or more affidavits, may issue a writ of habeas corpus, and inquire into the cause of detention. But this is a special and limited jurisdiction. If the plaintiff, in the recaption of his fugitive slaves, had proceeded under the act of congress, and made proof of his claim before some judicial officer in Michigan, and procured the certificate which authorized him to take the fugitives to Kentucky, these facts being stated, as the cause of detention, would have terminated this jurisdiction of the judge under the writ. Thus it would appear that the negroes were held under the federal authority, which in this respect, is paramount to that of the state. The cause of detention being legal, and admitted or proved, no judge could arrest and reverse the remedial proceedings of the master.

"And the return made by plaintiff, being clearly within the provisions of the constitution, as decided in the case of Prigg v. the state of Pennsylvania, and the facts of that return being admitted by the counsel for the negroes, the judge could exercise no further jurisdiction in the case. His power was at an end. The fugitives were in the legal custody of their master—a custody authorized by the constitution and sanctioned by the supreme court of the union. If the facts, on the return of the habeas corpus had been denied, it would have been incumbent on the master to prove them, and that would have terminated the power of the judge. Had the legislature of Indiana provided, by express enactment, that in such a case the judge should discharge the fugitives, the act would have been void. * *

"The legal custody of the fugitives by the master being admitted, as stated in the return on the habeas corpus, every step taken subsequently was against law and in violation of his rights. * *

"We must stand by the law. We have sworn to maintain it. It is expected that the citizens of the free states should be opposed to slavery. But with the abstract principles of slavery we have nothing to do. As a political question there could be no difference of opinion among us on the subject. But our duty is found in the constitution of the union, as construed by the supreme court. The fugitives from labor we are bound, by the highest obligations, to deliver up on claim

of the master being made; and there is no state power which can release the slave from the legal custody of his master.

"The chief glory and excellence of our institutions consist in the supremacy of the laws. We are instructed to reverence and obey them from our earliest years. As it is this, connected with a faithful administration of the laws, which has given security to persons and property throughout the wide extent of our country. In this consists, in a great degree, the strength of our government. And as we should be careful not to weaken its power. There is enough in the general aspect of our affairs, if not to alarm, at least to admonish us that every cord which binds us together should be strengthened." (Norris v. Newton et al., 5 McLean, 93, A. D. 1850.)

"All that is claimed or contended for is, that when it is shown that the commitment or detainer is under the constitution, or a law of the United States, or a treaty, the power of the state authority is at an end; and any further proceedings under the writ is *coram non judice* and void. In such a case, that is, when the prisoner is in fact held under process issued from a federal tribunal, under the constitution, *or a law of the United States*, or a treaty, *it is the duty of the officer not to give him up, or allow him to pass from his hands in any stage of the proceedings*. He should stand upon his process and authority, and, if resisted, maintain them with all the powers conferred upon him for that purpose. These views of the paramount authority of the laws of the federal government in no way endanger the liberty of the citizen. The writ of habeas corpus, secured to him under that government, affords the appropriate and effectual remedy for any illegality in the process or want of jurisdiction in the court, or for any unconstitutionality of the law" (Charge of Justice Nelson to grand jury cir. ct., S. D. N. Y., April, A. D. 1851, 1 Blatch. 635.)

"Any state law or regulation which interrupts, impedes, limits, embarrasses, delays or postpones the right of the owner to immediate possession of the slave is void." (Moore v. People, 14 How, U. S., 13, A. D. 1852.)

"This is a petition for a writ of habeas corpus to bring the petitioner before this court, with a view to his discharge from imprisonment, upon the grounds stated in the petition. We were strongly urged to issue the writ, without inquiring into its cause, and to hear an argument upon the petitioner's right to a discharge, on the return of the writ. This we declined to do, on grounds of principle, and common and well settled practice. Before a writ of habeas corpus is granted, sufficient probable cause must be shown; but when it appears upon the party's own showing that there is no sufficient ground prima facie for his discharge, the court will not issue the writ. And on a slight recurrence to the cases, we are of opinion that this is the established rule and practice at common law. Indeed the ordinary course is, for the court applied to, to grant a rule *nisi* in the first instance to show cause why the writ should not issue. Of course, if sufficient cause is shown, it will be withheld. Blake's case, 2 M. & S. 428; The King v. Marsh, 3 Bulst. 27. And in Hobhouse's case, 3 B. & Ald. 420, the question came before the court and was fully dis-

cussed. It was there considered that, whether the writ of habeas corpus were claimed at common law or under the statute, a proper ground ought to be laid before the court, previously to granting the writ. It is not granted as a matter of course; and the court will not grant the writ of habeas corpus when they see that, in the result, they must remand the party. The court in that case, which was a commitment by the house of commons, had granted the writ, in the first instance, upon an urgent claim that it was a matter of right, and some colorable authority cited in support of it, and on its return stated the reasons why it should not have been done.

We think that the same rule and practice have prevailed in this country. In Watkins's case, 3 Pet. 201, Marshall, C J., said, 'the writ ought not to be awarded, if the court is satisfied that the prisoner would be remanded.' Indeed, by necessary implication, it is the fair result of the provisions of the habeas corpus act of this commonwealth. The Rev. Sts. c. 111, § 2, require, in all cases of an application for the writ of habeas corpus, that the party imprisoned, or some person in his behalf, shall present a petition, and if held under legal process, or color or pretence of legal process, shall annex a copy of the process, under which the respondent claims to hold and detain him, or make proof by affidavit, that a copy of such a writ or warrant has been applied for, and refused. But why annex a copy of the process unless it be to enable the court to form an opinion whether the party is rightly held in custody or not; and why form an opinion in that stage of the proceeding, if it is to constitute no ground for judicial action? It is urged that this is a writ of right, and therefore grant, able without inquiry. But it is not a writ of right in that narrow and technical sense; if it were, the issuing of it would be a mere ministerial act, and the party claiming it might go to the clerk and sue it out, as he may a writ on a claim for land or money. It is a writ of right in a larger and more liberal sense; a right to be delivered from all unlawful imprisonment. Nor does this limit or restrain the full and beneficial operation of this writ, so essential to the protection of personal liberty. The same court must decide whether the imprisonment complained of is illegal; and whether the inquiry is had, in the first instance, on the application, or subsequently, on the return of the writ, or partly on the one, and partly on the other, it must depend on the same facts and principles, and be governed by the same rule of law. It was upon these grounds, that we stated on the presentation of a similar petition, that no sufficient cause appeared upon the petition for granting a writ; and upon further consideration we now repeat, that when it appears on the party's own showing in the petition, that if brought before the court, he would not be entitled to a discharge, the court will not issue the writ. * *

"The evils existing immediately before the adoption of the constitution, and the greater and more appalling evils in prospect, indicated the absolute necessity of forming a more perfect union, in order to secure the peace and prosperity of all the states. This could only be done by the several states renouncing and relinquishing a portion of their powers of sovereignty; and these were the right of war and

"That imprisonment is unlawful, however formal it may be, that affects to punish an act enjoined or justified by the supreme law of the land." (Ex parte Jenkins, 2 Wallace, Jr., 529, A. D. 1853.)

"With the obligation of this stringent and to him paramount law resting on him, was the marshal bound to obey the process of the probate judge? It would seem there was no intention on the part of the marshal to treat that judge with contemptuous disregard. He first appeared before him, and by his counsel exhibited all the facts as to the apprehension, custody and disposition of the fugitives, submitting at the same time a motion for the dismissal of the writ of habeas corpus. This motion was overruled, and the marshal was required to make a return to the writ. He then presented an answer, couched in respectful terms, stating the reasons why he could not produce the bodies of the fugitives. Was this in contempt of the authority of the probate judge? The marshal states in his answer, duly sworn to, that in his conduct he was governed by what he regarded his duty under the constitution and laws of the United States.**

"Authorities of the same import could be greatly multiplied, but it is unnecessary to adduce more. If judicial decisions are entitled to any consideration, it is clearly established that, though it may be competent for a state judge to issue the writ of habeas corpus in a case of imprisonment under the authority of a law of the United States, when the fact is made known to him, his jurisdiction ceases, and all subsequent proceedings by him are void." (Ex parte Robinson, 1 Bond's Rep. 44, A. D. 1856.)

"There is high judicial authority for the exercise of the power in question by a judge of the United States, under the act of 1833, in the case exparte Robinson, 6 McLean, 355, known as the Rosetta case. The facts stated are, that a female slave, traveling in company with her master, in the state of Ohio, was taken by a writ of habeas corpus before a probate judge at Columbus, and adjudged by him to be free. She was afterwards arrested by the marshal as a fugitive, upon a warrant issued by a commissioner, and upon a habeas corpus issued by Judge Parker of the court of common pleas of Hamilton county, the alleged fugitive was discharged from the custody of the marshal. She was again arrested upon another warrant issued by the same commissioner, and while in custody and before the examination by the commissioner, Judge Parker adjudged the marshal guilty of a contempt for re-arresting the female; and he was committed to jail under that judgment. Judge McLean, on the petition of the marshal, issued a writ of habeas corpus returnable before him; and after full argument on the facts stated, ordered the marshal to be discharged from imprisonment. The learned judge did not hesitate to issue the habeas corpus under the statute of 1833, and admitted evidence of the facts relating to the imprisonment of the marshal, and discharged him on the ground that he was imprisoned for an act omitted to be done in obedience to law. Although in that case there had been a judgment by a court of record that the alleged fugitive was entitled to her discharge, this was not held to be conclusive; and the judge asserted the right of going behind the judgment and examining the whole proceeding. The result

was, that the imprisonment of the marshal was declared to be illegal, and for an act omitted, pursuant to the law of the United States. In his opinion the judge says: 'A sense of duty compels me to say that the proceedings of the honorable Judge Parker were not only without authority of law, but against law, and that the proceedings are void, and I am bound to treat them as a nullity.'

"Another case cited in argument, ex parte Jenkins, 2 Wallace, Jr., 521, asserts the power of a federal judge to issue the writ of habeas corpus in all cases within the language of the act of 1833, and to discharge, under all circumstances, where the imprisonment is for an act done by authority of the United States. The learned Judge Grier, of the supreme court of the United States, in his opinion in that case says: "The authority conferred on the judges of the United States by this act of congress, gives them all the powers which any other court could exercise, or gives them none at all. If under such a writ they may not discharge their officer, when imprisoned by any authority for an act done in pursuance of a law of the United States, it would be impossible to discover for what useful purpose the act was passed. Is the prisoner to be brought before them only that they may acknowledge their utter impotence to protect him?'

"The last case referred to is very similar, in several of its aspects, to the one before this court. In that case several deputy marshals were resisted in their attempts to arrest a fugitive. A complaint was made before a justice of the peace, charging the deputies with an assault and battery on the fugitive; a warrant was issued by the justice and the deputies were lodged in jail. They applied for a writ of habeas corpus; and although it appeared on the hearing they had been committed on process, legal and right on its face, Judge Grier received evidence that the deputies were imprisoned for an act done in the discharge of their duty, and without hesitancy delivered them from the custody of the jailor.

"These cases establish beyond doubt that a federal judge, or court, upon the return of a habeas corpus issued pursuant to the act of 1833, setting up an imprisonment under state process, regular on its face, may receive evidence as to the facts connected with such imprisonment; and, if it appears to have been for an act done or omitted in the performance of official duty, to order the discharge of the party. There is no reason to doubt the correctness of this construction. It does not imply any invasion of the sovereignty of the state, whose process is thus treated. Nor is it based on any assumption or claim that a federal court or judge has any jurisdiction to revise or set aside the judgments of the courts or magistrates of the state. It is merely the exercise of power to inquire into the cause of imprisonment; and if such cause is within the contemplation of the act to grant an order for the discharge of the imprisoned party. Neither does it import, as suggested in the argument, that a federal judge or court can protect an officer of the United States from punishment for a crime committed against the laws of the state, under pretence that he was doing his duty.

"If the jurisdiction to the extent indicated does not exist, it is very

clear the sovereignty of the United States is liable every day to be contemned and trampled upon. Upon any other view, it is entirely in the power of any one corrupt enough to make a false oath against an officer of the United States, having charge of offenders against its laws, to procure their release, and most effectually to obstruct and nullify the legislation of the union for the punishment of crime, It is easy to conceive how, not only the fugitive slave law, but the laws for the protection of the post office department, and laws punishing the making of spurious coins of the United States, may be defeated in their salutary operations, if the jurisdiction referred to does not exist. * *

"Having the prisoners thus in lawful custody, they had an undoubted right to use all the force necessary to retain them in such custody. And in case of an open, undisguised attempt to rescue them by force, they would be justified in killing the assailants, if that were necessary to retain possession of their prisoner, and such killing would not be a crime against the state of Ohio. * *

"The doctrine seems now to be settled that a state judge has no jurisdiction to issue a writ of habeas corpus for a prisoner in custody of an officer of the United States, if the fact of such custody is known to him before issuing the writ. And it is well settled that if, upon the return of the writ, it appears that the prisoner is in custody under the authority of the United States, the jurisdiction of the state judge is at an end, and all further proceedings by him are void. In the case of Sims, reported in 7 Cushing's Rep. 285, the supreme court of Massachusetts decided, that in all cases 'before a writ of habeas corpus is granted, sufficient probable causes must be shown; but when it appears upon the party's own showing that there is no sufficient ground prima facie for his discharge, the court will not issue the writ;' and again the court say: 'It is not granted as a matter of course, and the court will not grant the writ of habeas corpus when they see that in the result they must remand the party.' In the case of Norris v. Newton and others, 5 McLean, 92, Judge McLean says: 'I have no hesitation in saying that the judicial officers of a state, under its own laws, in a case where an unlawful imprisonment is shown by one or more affidavits, may issue a writ of habeas corpus and inquire into the cause of detention.' The learned judge, it will be noticed, has reference to an imprisonment under the authority of the United States, and decides, as the condition on which a state judge may issue a writ of habeas corpus, that it shall first be shown, by affidavit or otherwise, that such imprisonment is unlawful. And he holds, that when it is known to the judge that the imprisonment is under a law of the United States, his jurisdiction ceases and all further proceedings in the case will be *coram non judice*. * *

"His return of the fact that the prisoners were held by the paramount authority of the United States would have been a complete justification for not serving the writ. He was fully aware that the writ could not be served without bringing the authorities of the United States and the state of Ohio into direct collision, and that the issue to be settled was purely one of physical power. If unnecessarily,

and against the obligations of official duty, he placed himself in a position of peril, he may be supposed to have done so with a full knowledge of what the consequences might be, and a determination to meet them at all hazards. * *

"it seems clear that the deputy marshals were right, under the circumstances of this case, in resisting the attempt to rescue the prisoners from their custody. Judge Nelson, one of the justices of the supreme court of the United States, has stated the law on this point with great force and accuracy. While he concedes that there may be cases in which a state judge may be justified in granting a habeas corpus for a prisoner in confinement under United States process, he asserts that, if the process is legal, the officer having the person in charge will not be justified in surrendering that custody under any circumstances. The learned judge says. 'In such case—that is, where the prisoner is, in fact, held under process issued by a federal tribunal, under the constitution, or a law of the United States, or a treaty—it is the duty of an officer not to give him up, or allow him to pass from his hands at any stage of the proceedings. He should stand upon his authority; and if resisted, maintain it with all the power conferred on him for that purpose.'

"The power called forth in its enactment is one which belongs exclusively to the government of the union, and with which the states have no right to interfere. It should be remembered, too, that it is an emanation of the will of the nation, expressed through the representatives of the states and the people, according to the forms of the constitution. Its repeal by the same power that passed it, is the only method by which it can cease to have the force of law." (Ex parte Sifford, marshal, et al., 5 Am. Law Reg. 660, A. D. 1856.)

"There can be no such thing as judicial authority, unless it is conferred by a government or sovereignty; and if the judges and courts of Wisconsin possess the jurisdiction they claim, they must derive it either from the United States or the state. It certainly has not been conferred on them by the United States, and it is equally clear it was not in the power of the state to confer it, even if it had attempted to do so; for no state can authorize one of its judges or courts to exercise judicial power, by habeas corpus or otherwise, within the jurisdiction of another and independent government. And, although the state of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the constitution of the United States. And the powers of the general government and of the state, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independent of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a state judge or a state court, as if the line of division was traced by land-marks and monuments visible to the eye. * * The constitution was not formed merely to guard the states against danger from foreign nations, but mainly to secure union and harmony at home, for, if this object could be attained, there would be but little danger from

correct exposition of the law, we have no authority to interfere in the matter." (Ex parte Kelly et al, 37 Ala. 476, A. D. 1861.)

"In some classes of cases, federal jurisdiction is exclusive; in some, state jurisdiction; whilst in others the federal and state judiciary have concurrent authority. The dividing line is not always to be readily ascertained. * *

"A thorough knowledge of the law, applicable to each case, and implicitly followed, would render all conflict of legal authority almost an impossibility. * * No one in this land is so exalted as to be above its restraining force, and none so humble as to be beneath its protecting care. * * Foremost of all should be the tribunals of law, to keep strictly within legal limits. Whilst fearless in the exercise of lawful power, they should be scrupulously vigilant not to exceed the legal boundaries set to their action. * *

"The reasonable construction would necessarily be, that the United States courts can take no jurisdiction beyond the range of federal authority—that they must confine their action within the purview of federal jurisdiction. * *

"In ex parte Jenkins, 2 Wallace, Jr., 535; ex parte Robinson, 6 McLean, 355; United States v. Morris, 2 Am. Law Reg. 348, and Thomas v. Crossin, 3 Am. Law Reg. 226, the United States judges or courts not only issued the writ of habeas corpus where there were commitments by state process, but where it did not appear on the face of the warrant that the process was under any color of authority of the United States. That course was held by the learned judges who issued the writs, to be not only permissible under the act of 1833, but to be an imperative duty. They even went behind the terms of those warrants or 'commitments,' and afther proofs, *aliunde*, decided that as the commitments were illegal and for the acts done under the authority of the United States, it was their duty to discharge the prisoners. * *

"In each instance where the federal courts have been compelled to act under the law of 1833, so far as is known, they have not failed to exercise and enforce their authority in cases similar to those just mentioned. Judge McLean and Judge Grier, of the supreme court, have given elaborate, convincing and sound decisions upon that subject. the correctness of which Judges Leavitt, Kane, and Miller, of the district courts, have not hesitated to put into practical application, despite local excitement, prejudices and resistance. * *

"To remove all shadow of doubt, only one step further need be taken—that is, to determine whether the state courts, (as contended by counsel), have either exclusive or concurrent jurisdiction. The United States supreme court has settled that point also. It solemnly decided in 1858, that the state courts have no jurisdiction whatsoever where the confinement is under the authority of the United States. The opinion is too clear and important to be omitted. It was pronounced by Chief Justice Taney. The importance of the questions discussed by him, and the force of his reasoning furnish ample justification, for the length of the extract made." (Re McDonald, 9 Am. Law Reg. 664, A. D. 1861.)

"The federal tribunals in the different states, deriving power from and being responsible to the same source and authority, having complete if not exclusive jurisdiction over such subject matters by the use of the writ of habeas corpus and otherwise, it would be no abridgment of the right of the citizen to be protected in the enjoyment of his personal liberty, in such case to turn him over to the judicial power of the United States, where ready and effectual aid is provided by law for his security." (State v. Zulich, 5 Dutch. 413, A. D. 1862.)

"The only remaining question is that of the jurisdiction of this court, and of state officers, to inquire into the regularity of the draft, and the legality of Spangler's detention. Upon this question I think there can be no doubt that we have none. The federal government and the state governments exist as independently as the governments of the several states. Each acting within its sphere is foreign to the other, and independent; and this principle extends to the jurisdiction of the courts of each. * * The constitution was not framed merely to guard the states against danger from foreign nations, but mainly to secure union and harmony at home; for if this object could be attained, there would be little danger from abroad; and to accomplish this purpose it was felt by the statesmen who framed the constitution, and by the people who adopted it, that it was necessary that many of the rights of sovereignty which the states then possessed should be ceded to the general government, and that in the sphere of action assigned to it, it should be supreme, and strong enough to execute its own laws by its own tribunals, without interruption from a state or state authorities. The writ must be dismissed for want of jurisdiction. * * By Martin C J. Re Spangler, 11 Mich. 305, A. D. 1863.

"The first question that meets us in this case is one of jurisdiction —a question, it must be admitted, of more than ordinary importance, as it involves a construction of the constitution of the United States as to the power of the federal and state courts, in the use of the writ of habeas corpus, to discharge from imprisonment persons illegally deprived of their liberty.

"We have two governments—a state government and federal government. Each of these governments is supreme within its appropriate sphere. The line that separates the powers of the two is not at all times easy to trace. Some parts of it are well defined, while other parts of it are more obscure and difficult to follow. This is owing, in part, at least, to the double relation we sustain as citizens of both governments, subject to the laws and regulations of both, and owing allegiance to both.

"According to the theory of our government, the sovereign power is in the people. And viewing that part of it delegated by them for governmental purposes as a whole, the two governments together make that whole. In this sense neither is a whole in itself, any more than the legislative, executive or judicial part of the government is the whole government. Each of these departments is but a part of the government, acting independently of the others, and at the same time correlatively with them; and so closely are they bound together, as a whole, that it is not at all times an easy task to find where the

independent action of one of them ceases and that of another begins. It is not, therefore, at all surprising that a like difficulty should sometimes be experienced in determining between the powers of the federal and state governments, as a whole—in fixing the precise point where the functions of one ceases to act, and those of the other begin to act. The power to act in a given case we may know exists in one of the two, but in which, may not be so easy of solution; and yet it may be necessary to the harmonious action of the sovereign power delegated to them that it should be solved. For, without the independent, harmonious and correlative action of both, we can hardly expect to gather the golden fruit anticipated by our fathers in the formation of our somewhat complicated, and yet simple form of government.

"The two governments, in the sense already stated, are only one whole. Without either we should have but half a government; a fact too frequently overlooked, and we fear too little regarded by us, when we permit ourselves to become the partizans of either, in opposition to the other. We should think a man very unreasonable who should attempt to increase his powers of locomotion by strengthening one of his limbs at the expense of the other. This shows us the great care that should always be kept in view by each government, while determining its own powers, not to encroach on the powers of the other.

"Neither is supreme, in the sense that it has power to dictate to or control the other, when acting in its appropriate sphere. Each is supreme within its own sphere. Neither is supreme within the sphere of the other. A common constituency supports, upholds, and gives vitality to both. To the federal government belong all questions outside of the states that pertain to us as a nation, and such powers within the states as are given to it by the federal constitution, in express terms or by clear implication; while all local and municipal powers not ceded to the federal government, belong to the states. Each has its writ of habeas corpus. Each has power under its constitution to suspend the writ on the happening of a certain contingency. The object of the writ is the same in both governments. It is to release from imprisonment, within its judicial limits, persons entitled to its protection who are deprived of their liberty without warrant of law.

"The territory of a state is common to both governments. The territorial jurisdiction of both governments, therefore, so far as it respects the state, is the same. But is the judicial jurisdiction incident to the writ of habeas corpus the same?. We think not. Otherwise the powers of the federal and state courts, as it regards this court, are identical; and if they have a common concurrent jurisdiction, the power given to either government by its constitution, to suspend the writ, for all practical purposes is a nullity, as neither can suspend the writ of the other, and as the only effect of a suspension by one, would be the same as that of abolishing the jurisdiction of one of two writs having a common concurrent jurisdiction, viz: to drive the suitors of both courts into the one whose jurisdiction

was left unimpaired Besides if both governments have a common jurisdiction in the use of this writ, we have two independent governments, neither responsible to the other, acting upon the same subject matter. One may imprison, the other may release from such imprisonment, for the former to renew the imprisonment, and the latter again set free, until the stronger overpowers the weaker.

"Any construction of the federal constitution that leads to such results, must necessarily be erroneous. We can not suppose the people, in adopting the federal constitution, intended to make such a distribution of the sovereign power delegated by them as to place one part of it in antagonism to another.

"There must, therefore, from the very nature of our institutions, be a line separating the powers of the two governments, on this, as well as on every other subject.

"The question then arises, where is that line, and what constitutes it? There can but be one. And that appears so clear to my mind (it may appear differently to others) that I almost wonder how any other should ever have been thought of. It is this: that the state courts have the right, and it is their duty, in all cases authorized by the laws of the state, to issue the writ of habeas corpus to inquire into the legality of the imprisonment of any person deprived of his liberty within the state, and to discharge him therefrom if wrongfully imprisoned, unless he is imprisoned or restrained of his liberty by the federal government.

"By this I mean, not by one acting in his own right, but by one acting for and in right of, and under authority from the federal government; or claiming in good faith and under color of such authority to be so acting. I use these last words for the reason that good faith and color of authority are necessary to prevent imposition, and to oust the state jurisdiction. These being judicially ascertained, the state court can go no further. It cannot inquire into the validity of the authority, or the legality of the detention under it; for this would be taking jurisdiction of the whole question.

"The state courts have a right to inquire whether the person imprisoned is within the state jurisdiction, which he must be if in the state, unless he is deprived of his liberty by authority of the federal government; in which case he is not, so far as it regards his imprisonment and the state writ of habeas corpus. In the language of Chief Justice Taney, in the cases of Ableman v. Booth, and the United States v. Booth, 21 How. 523, 'He is then within the dominion and exclusive jurisdiction of the United States.' He is, as it regards the state habeas corpus, as completely beyond its reach for the purpose of releasing him, as he would be were he not within the state. Up to the point of imprisonment by the federal government the state habeas corpus has jurisdiction. It then ceases and the jurisdiction of the federal habeas corpus begins. In all cases of imprisonment; other than by the federal government, the state writ of habeas corpus has exclusive jurisdiction. In all cases of imprisonment by or under authority of the federal government, the federal writ of habeas corpus has exclusive jurisdiction.

"Instances have occurred in which the writ of each government has been sent across this line into the dominions of the other. Such irregularities are calculated to produce irritation, and bring on an unseemly conflict between the state and federal courts, and thereby disturb the harmonious action of the two governments. As we have already said, any construction of the federal constitution that leads to such results, must be untenable. * *

"The fact that the governor, as appears by his proclamation, thought proper to act in ordering the draft (and we do not question his right) under the laws of congress and orders of the war department, instead of the laws of the state, does not change the power under which the draft was made, and Spangler is held by the draft commissioner. The state executive is the conduit through which the power passes that holds the prisoner; and for the true character of that power we must look to its source, and not to the channel through which it flows If one of our sheriffs should be deputed by the United States marshal to serve a writ from the federal court, this court would have no authority to entertain a motion to set aside the service, because it was made by the sheriff. And it would not alter the case if the state should be interested in the prosecution of the suit in which the service was made.

"The writ and all further proceedings under it, I think, should be dismissed for want of jurisdiction." (By Manning J., Re Spangler, 11 Mich 307, A. D. 1863.)

"He further returns, that it is his legal duty to deliver the said deserter to the nearest military commander or military post, and that he intends to perform such duty as soon as possible. That the production of the prisoner in court would be inconsistent with and inviolation of his duty as provost marshal. That the said deserter is now held under authority of the United States, and that therefore, without intending any disrespect to the judge who issued the writ, he declines to produce the prisoner, or permit him to be produced, or to subject him to the process of the said court. The counsel for the relator alleging that the return is insufficient, moves for an attachment to compel the defendant to make a more full and complete return to the writ. * * If the case presented nothing more than an application for discharge from military service on the ground of minority, we could not hesitate to liberate the prisoner. But the defendant denies our jurisdiction over the case, and consequently our authority to interfere, on the ground that the prisoner is under arrest as a deserter, and liable to be punished by the sentence of a court martial. That being held in custody under authority of the United States, the state courts have no jurisdiction in the premises. The substituted return and the motion for attachment were made for the very purpose of raising the question of our jurisdiction over the case. * *

"Then according to Ableman v. Booth, we have no more authority to release the prisoner, than if he was under arrest for piracy, or aiding and abetting the escape of a fugitive slave. What then is our duty? To assume jurisdiction, right or wrong? The law as pronounced in that case declares that when we are fully apprised by the return of

the authority under which the arrest was made, we can proceed no further. Whatever our own views or feelings may be concerning the inconvenience or hardship of the case, we cannot disregard the law as settled by the highest court in the land. We must take the law as we find it written, and obey it, otherwise law becomes no more law. * *

"But would not the assumption of authority by us on such grounds, be fraught with the very mischief which the supreme court in Ableman v. Booth, endeavored to suppress, by laying down a plain rule, and marking distinctly the limits of the jurisdiction of the courts of the state and of the United States respectively, so as to prevent if possible the least clashing or conflict between two distinct sovereignties? The rule is comprehensive, but in order to be efficacious it demands a liberal construction. To evade it by nice or technical distinction would very seriously impair its efficacy. If we can go behind the return and inquire into the validity of the enlistment, we see no reason why we may not with the same propriety, inquire into the constitutionality of the act punishing desertion, or of the conscription act under which this arrest was made. But this would be doing the very thing the supreme court of Wisconsin did in order to release a prisoner in custody under the fugitive slave law, and upon which Judge Taney animadverts with no slight degree of severity. * * An attempt on our part to release the prisoner would be a plain and palpable violation of the law as we read it. But for this obstacle we should feel it our duty to liberate him. We therefore adjudge the return sufficient, and the motion for attachment is refused." (Shirk's case, 3 Grant's Cases, 460, A. D. 1863.)

"I do not intend any disrespect in the above return to the court of his honor Mayor Buchanan, but must respectfully decline obeying the writ through a sense of duty. * *

"But the relator refused to obey this order, and continued to hold the recruit in the United States service by virtue of his enlisiment. For this refusal the mayor's court proceeded against him by process of contempt, and it is under this process that he is now in confinement. * *

"From the beginning of the government down to the decision of the supreme court of the United States in 1858, in the cases of Ableman v. Booth, and United States v. Booth, 21 How. 506, I suppose the very decided preponderance of authority in the state courts sustains the jurisdiction of those courts to discharge upon habeas corpus prisoners who, in their judgment are illegally held, though held under the authority of the United States. The cases will be found collated in Hurd on Habeas Corpus, 164–202. The jurisdiction, it is true, had been frequently disclaimed by able state judges; as by Chief Justice Lansingin 1799, In re Husted, 1 Johns. Cas. 136; by Chief Justice Nicholson in 1809, In re Roberts, 2 Hall's Law J. 192; and by Chief Justice Kent in 1812, In re Ferguson, 9 John's 239. But, as I have said, down to the decision in the case of Ableman v. Booth, the preponderance of state decisions was the other way, though since that decision the weight of authority even in the state courts is against the jurisdiction. State v. Zulich,

1862, 29 N J. L., 5 Dutch. 409; In re Spangler, 1863, in the supreme court of Michigan, 2 Am. Law Reg. N. S. 508; Matter of Hopson, 1863, 40 Barb. 43–59; In re Jordan, 1863, 2 Am. Law Reg N. S. 749. I have seen other decisions of state courts cited as supporting this view, but as they have not been accessible to me, I will simply enumerate them, that they may be consulted by those who shall have opportunity. State v. Janeway—opinion by E. Dayton Ogden, J., of the supreme court of New Jersey, reported in Newark Daily Advertiser, December 15, 1862; In re Bully, in New York court of common pleas—opinion by Daly, J, reported in New York Tribune and Herald of March 19, 1867; In re O'Connor, in New York supreme court —opinion by Ingraham, J., reported in New York Tribune, December 27, 1866. And see 2 Abb. Nat. Dig. 609, note.

"The decisions and opinions in the district and circuit courts of the United States, both before and since the decision in Ableman v. Booth, have denied the state jurisdiction. In re Kuler, 1843, 1 Hempst. 306; Norris v. Newton, 1850, 5 McLean, 99–101; In re Veremaitre, 1851, U. S. district court, southern district of New York, and cited as reported in 9 N. Y. Leg. Obs.; Charge to the grand jury by Nelson, J., 1851, 1 Blatchf., Appendix; In re Sifford, 1857, U. S. district court for southern district of Ohio, 5 Am Law Reg. 659; In re McDonald, 1861, district court for Missouri, 9 Id. 661; Conk. Tr. 4 ed., 583-585 * *

"But if a state court, after it is informed by a proper return that the party in whose behalf it has issued a writ of habeas corpus is imprisoned under authority of the United States, cannot require him to be brought before it, that court can make no inquiry into the actual legality of the authority; for such an inquiry is of no value, and would be an idle ceremony without the presence of the prisoner. * *

"But the supreme court say it is the duty of a person who holds a prisoner under authority of the United States, when he makes it known to the state court that he so holds him, to resist any order of that court discharging him, and this they could not have said if, in their opinion, the state court has jurisdiction to inquire into and pronounce upon the validity of his authority. * *

"Nay, more, it then became, say the supreme court, substantially 'the duty' of the relator 'not to take the prisoner, nor suffer him to be taken before the mayor's court, and if the state court attempted to control him in the custody of his prisoner it was his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of the United States against illegal interference.'

"Now' if it was the duty of the relator, by virtue of the laws of the United States, to retain his prisoner, notwithstanding the order of the mayor's court, then it is plain he is in confinement 'for an act done in pursuance of a law of the United States,' or 'of the authority of the United States,' as the supreme court expresses it, and must be discharged." (Re Farrand, 1 Abbott's U. S. R. 142, A. D. 1867.)

"True, the warrant under which Jenkins acted was issued for an alleged 'fugitive from labor,' under the fugitive slave act of 1850, and the warrant under which Roberts acted was for an alleged criminal

offense, under the revenue laws of 1866 and 1867. But I suppose no one will assert that the rights of masters to their slaves are higher than the rights of the government to its revenue; or that the person of an officer when seeking to arrest a fugitive slave is more sacred than when endeavoring to arrest a criminal." (U. S. ex rel. Roberts v. Jailor of Fayette county, 2 Abbott's U. S. Rep., 279, A. D. 1867.)

"Our governmental theory recognizes separate and defined spheres for the United States and the several states, with all appropriate incidents—judicial and others. Any improper interference or encroachment by one upon another serves to weaken all.

"Under the law as stated in the cases cited, and from the return of the marshal in this, it appears that the petitioner is in his custody under the authority of the United States. This court can, therefore, proceed no further, and the marshal must retain his prisoner. It is so ordered." (Ex parte Hill, 5 Helm's Nev. R. 159, A. D. 1869.)

"These decisions were all made on the ground that the state court, judge or officer is utterly without jurisdiction to release the soldier on habeas corpus, when it appears prima facie, that he is held to service in the army by an officer acting under authority of the United States and claiming to hold him as an enlisted soldier; and that the enquiry whether he is an enlisted soldier, or whether he could be lawfully enlisted, is one of which the state tribunal, from that moment, ceases to have jurisdiction. In the case of Casey, not only did this appear from the return made by General Neill, but it also appeared from the petition presented to Judge McCunn for the allowance of the writ. * * The petition itself, therefore, showed on its face, that Casey was held to service in the army, by an officer acting under the authority of the United States, and claiming to hold him as an enlisted soldier, and therefore, showed that Judge McCunn had no jurisdiction to issue the writ. But if, under the statute of New York, it was imperative on the judge to issue the writ, his want of jurisdiction in the case appeared clearly from the return. * *

"If there was no jurisdiction to issue the writ, no return at all was necessary. If a return was required, he was, by the statute, exempted, as a sworn public officer, from verifying it by oath.

"Nor was he bound to produce the body of Casey. It was held by the supreme court of the United States, in the case of Ableman v. Booth, 21 Howard, 506, 523, that, where a state court or judge is without jurisdiction to release on habeas corpus, in a given case, a person held in custody under the authority of the United States, it is the duty of the officer who so holds such person in custody not to take such person, or suffer him to be taken, before the state court or judge, on the habeas corpus, and, also, his duty, if the state court or judge attempts to control him in any respect in his custody of such person, to resist such attempt by force. That case is also an authority to the point, that there was no power in the state judge to issue the writ of habeas corpus in the case of Casey, on the facts set forth in the petition for the writ.

"As the state judge had no jurisdiction to proceed in the case of Casey, certainly after the return made by General Neill, and no juris-

diction to require the body of Casey to be produced, or to require any other or further return to the writ, he was without jurisdiction to issue the warrant of attachment against General Neill, which states on its face that it is issued solely because General Neill did not produce the body of Casey, and did not make any other return to the writ of habeas corpus than the return which he is shown to have made.

"Respondent was bound to maintain such custody as against the unlawful interference of a state judge. * * This court is, therefore, bound to discharge him from the custody in which he is held by virtue of the warrant of attachment." (Re Neill, 8 Blatchford, 164, A. D. 1871.)

Mr. Justice Field, after stating the case, delivered the opinion of the court as follows:

"The important question is presented by this case, whether a state court commissioner has jurisdiction, upon habeas corpus, to inquire into the validity of the enlistment of soldiers into the military service of the United States, and to discharge them from such service when, in his judgment, the enlistment has not been made in conformity with the laws of the United States. The question presented may be more generally stated thus: Whether any judicial officer of a state has jurisdiction to issue a writ of habeas corpus, or to continue proceedings under the writ when issued, for the discharge of a person held under the authority, or claim or color of the authority, of the United States, by an officer of that government. For it is evident, if such jurisdiction may be exercised by any judicial officer of a state, it may be exercised by the court commissioner within the county for which he is appointed; and if it may be exercised with reference to soldiers detained in the military service of the United States, whose enlistment is alleged to have been illegally made, it may be exercised with reference to persons employed in any other department of the public service when their illegal detention is asserted. It may be exercised in all cases where parties are held under the authority of the United States, whenever the invalidity of the exercise of that authority is affirmed. The jurisdiction, if it exist at all, can only be limited in its application by the legislative power of the state. * *

"The decision of this court of the two cases which grew out of the arrest of Booth, that of Ableman v. Booth, and that of the United States v. Booth, disposes alike of the claim of jurisdiction by a state court, or by a state judge, to interfere with the authority of the United States, or whether that authority be exercised by a federal officer or be exercised by a federal tribunal. [Citing fully Ableman v. Booth, 21 Howard, 506.] * *

"State judges and state courts authorized by laws of their states to issue writs of habeas corpus, have undoubtedly a right to issue the writ in any case where a party is alleged to be illegally confined within their limits, unless it appear upon his application that he is confined under the authority, or claim and color of the authority, of the United States, by an officer of that government. If such fact appear upon the application the writ should be refused. If it do not appear,

the judge or court issuing the writ has a right to inquire into the cause of imprisonment, and ascertain by what authority the person is held within the limits of the state; and it is the duty of the marshal, or other officer having the custody of the prisoner, to give, by a proper return, information in this respect. His return should be sufficient, in its details of facts, to show distinctly that the imprisonment is under the authority, or claim and color of the authority, of the United States, and to exclude the suspicion of imposition or oppression on his part And the process or orders, under which the prisoner is held, should be produced with the return and submitted to inspection, in order that the court or judge issuing the writ may see that the prisoner is held by the officer, in good faith, under the authority, or claim and color of the authority, of the United States, and not under the mere pretence of having such authority.

"This right to inquire by process of habeas corpus, and the duty of the officer to make a return, 'grows necessarily,' says Mr. Chief Justice Taney, 'out of the complex character of our government and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its power, and each within its sphere of action, prescribed by the constitution of the United States, independent of the other. But, after the return is made, and the state judge or court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of habeas corpus nor any other process issued under state authority can pass over the line of division between the two sovereignties He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offence against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress.'

"Some attempt has been made in adjudications, to which our attention has been called, to limit the decision of this court in Ableman v. Booth, and the United States v. Booth, to cases where a prisoner is held in custody under undisputed lawful authority of the United States, as distinguished from his imprisonment under claim and color of such authority. But it is evident that the decision does not admit of any such limitation. It would have been unnecessary to enforce, by any extended reasoning, such as the chief justice uses, the position that when it appeared to the judge or officer issuing the writ, that the prisoner was held under undisputed lawful authority, he should proceed no further. No federal judge even could, in such case, release the party from imprisonment, except upon bail when that was allowable. The detention being by admitted lawful authority, no judge could set the prisoner at liberty, except in that way, at any stage of the proceeding. All that is meant by the language used is, that the state judge or state court should proceed no further when it appears, from the application of the party, or the return made, that the prisoner is held by an officer of the United States under what, in truth, purports to be the authority of the United States; that is, an au-

thority, the validity of which is to be determined by the constitution and laws of the United States. If a party thus held be illegally imprisoned it is for the courts or judicial officers of the United States, and those courts or officers alone, to grant him release.

"This limitation upon the power of state tribunals and state officers furnishes no just ground to apprehend that the liberty of the citizen will thereby be endangered. The United States are as much interested in protecting the citizen from illegal restraint under their authority, as the several states are to protect him from the like restraint under their authority, and are no more likely to tolerate any oppression. Their courts and judicial officers are clothed with the power to issue the writ of habeas corpus in all cases, where a party is illegally restrained of his liberty by an officer of the United States, whether such illegality consist in the character of the process, the authority of the officer, or the invalidity of the law under which he is held. And there is no just reason to believe that they will exhibit any hesitation to exert their power, when it is properly invoked. Certainly there can be no ground for supposing that their action will be less prompt and efficient in such cases than would be that of state tribunals and state officers.

"It follows, from the views we have expressed, that the court commissioner of Dane county was without jurisdiction to issue the writ of habeas corpus for the discharge of the prisoner in this case, it appearing, upon the application presented to him for the writ, that the prisoner was held by an officer of the United States, under claim and color of the authority of the United States, as an enlisted soldier mustered into the military service of the national government; and the same information was imparted to the commissioner by the return of the officer. The commissioner was, both by the application for the writ and the return to it, apprised that the prisoner was within the dominion and jurisdiction of another government, and that no writ of habeas corpus issued by him could pass over the line which divided the two sovereignties." (Tarble's case, 13 Wallace's Rep. 401, A. D. 1871.)

"The return and answer having been filed the counsel for the state of Massachusetts moved that the writ be dismissed, or that the prisoner be remanded pending the proceedings in the state court on the writ of certiorari on the ground that the prisoner was to be regarded as constructively in the custody of the state court, and that therefore this court would not on principles of comity proceed with a matter which might involve the taking of the prisoner out of the custody of the state court.

"But it was held that the proceedings pending in the state court in the nature of a review on appeal from the decision of the justice did not prevent this court from proceeding with the cause, and the motion was denied. * *

"A constitutional and legal right, having fixed and well ascertained conditions, and the same instrument and frame of government, which for national purposes welded the several states into a single country, brought this matter and this obligation within the purview and juris-

diction of the federal authority. As the constitution is more than a compact between the states, so this right and this obligation, as secured by the constitution, became something more than an obligation and a right resting in contract or treaty. * *

"And upon the question whether the warrant of the governor is conclusive evidence in this proceeding that the party named in the warrant stands charged with crime in the state demanding his surrender, I am of opinion both on reason and authority that the warrant is conclusive. The statute itself expressly provides that the governor shall cause the party to be arrested and delivered up. It makes no provision for any other proceedings whatever subsequent to the issue of the mandate of the governor except the delivery of the party and his removal by the agent of the demanding state. It may well be assumed that in devolving this duty and responsibility on the highest executive officer of the state, congress understood that they were making a suitable provision for securing the careful execution of the duty under circumstances calling for great caution and circumspection. The governors of these states were the representatives of the sovereignty of the states, so far as it still existed in a qualified form. They were aided in their positions by high legal officials, and in some of the states had the constitutional right to call on the highest court in the state for its opinion on doubtful questions of law. They were especially charged with the execution of the laws of the state, and might be assumed to be naturally jealous of any attempt to abuse this particular right of demanding fugitives, since it was a demand for the surrender of their own citizens or persons found within the protection of their own laws. Not only is there nothing in the act to show that any proceedings subsequent to the issue of the warrant were contemplated to give full authority for the arrest and removal of the party, but there is nothing in the act requiring the governor issuing the warrant to attach thereto the evidence or copies of the evidence on which he acted, nor since the passage of the act has the practice obtained, so far as appears, of attaching such copies.

"This uniform practice of eighty-five years is strong proof that no such copies are necessary to accompany the warrant. * *

"The total want of power to compel the production of the papers on which the governor acted, is itself a strong argument against the intention of congress to make the governor's determination subject to review by the courts. The relations in which the states stood to each other at the time of the formation of the constitution, and the relations which that constitution created between them, as known and understood at the time of the passage of the act, make it not improbable nor unreasonable to suppose that the warrant of the governor should, on this question of the fact and sufficiency of the charge, be made within the intention of congress, conclusive, even though the effect of it is that the party should, when arrested on the warrant, be deprived of an opportunity to contest the charge on habeas corpus in the state in which he is arrested. The prior relations of the states were friendly. They had recently won their independence by a war, in which they had acted together. Their territories were largely

settled by people from the same country, and in all of them the system of the common law of England obtained, by which all persons restrained of their liberty, had free access to the courts on habeas corpus, to inquire into the cause of their detention. And the people of these states had entered by the constitution into 'a more perfect union,' among the declared objects of which were 'to establish justice, issue domestic tranquility, and promote the general welfare.' The thirteen states thereby became one nation, in all parts of whose territory the citizens of each were to have the rights and immunities of citizens of that common country, and were not to be in any of the states in the position of strangers and foreigners.

"Considering that all the disadvantage that results from the conclusiveness of the warrant of the governor on this point, is that the alleged fugitive is thereby removed to another state of the union, where he has open to him still the privileges of habeas corpus, and a trial according to the methods and under the securiety of a system of law similar to that prevailing in his own state, and where all his privileges of citizenship remain, and considering the existing relations of the state, there was neither such hardship nor such apparent risk of injustice as to have created any reasonable apprehension that such an arrangement imperiled or put in jeopardy the life or liberty of the citizen, or was liable to subject him to any unreasonable detention or inconvenience, beyond what was essential to a proper regard to the public safety, and the orderly administration of public justice. * *

"In the treatment of this subject it is not to be overlooked that this is in the nature of a national police regulation, and that the arrest, detention, and removal of the alleged criminal are not for the purposes of punishment, but for purposes preliminary to trial, and for the securing of the persons against whom there is probable cause to believe that they are offenders against the laws, and that this provision of the constitution and this act of congress are based upon the theory that, as between these states, the proper place for the inquiry into the question of guilt or innocence is the state where the offence is alleged to have been committed.

"In view, then, of the nature of the right and obligation sought to be enforced by this statute; and of the prior history of the subject matter; of the terms of the law itself, and the practice under it; of the character and dignity of the office of the governor, on whom the duty of determining the question, prior to the issue of the warrant, devolved; of the security against abuse afforded by his position, responsibility, and surroundings; of the evident impossibility of issuing process to review his decision; and of the relation between the states before and at the time of the enactment of the law; and of the purpose and effect of the warrant of removal; I think that the recital of the warrant was intended by congress to be conclusive as to the charge of crime made against the alleged fugitive, and that the refusal of Governor Robinson to furnish to the petitioner the requisition and accompanying copy of indictment, for the purpose of the proposed review of this decision by this court was in entire accordance with the proper view of his official duty, under the act of congress in question." Leary's case, U. S. dist. ct., S. D. N. Y., 6 Abbott's n. c., 47, A. D. 1879.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

IN RE ROBB.

Filed January 19, 1884.

FUGITIVES FROM JUSTICE ARRESTED AND RETURNED UNDER LAWS OF THE UNITED STATES.—The governor of a state in issuing a warrant for the arrest of a fugitive from justice, the officer who makes the arrest, and the party commissioned to receive the fugitive and deliver him to the authorities of the state where the offense is charged to have been committed, in pursuance of the provisions of sections 5278 and 5279 of the revised statutes of the United States, act under the authority of the laws of the United States, and *pro hac vice* are officers or agents of the United States.

WRIT OF HABEAS CORPUS—JURISDICTION.—Where a petition for a writ of *habeas corpus* presented to a state judge or court by a party in the custody of one claiming, in good faith, to be authorized to deliver him to the authorities of another state, as a fugitive from justice, in pursuance of the provisions of said sections, shows upon its face that the petitioner is so held in custody, under such claim made in good faith, the state judge or court has no jurisdiction to issue the writ. The jurisdiction, in such case, is exclusively in the courts of the United States.

ID.—DUTY OF CUSTODIAN.—Where a writ of *habeas corpus* has been issued by a state judge or court, and been served on the party having the custody of such alleged fugitive, it is the duty of such custodian to make full return to the writ as to the authority under which he holds the prisoner, and to exhibit to the court the original papers evidencing his authority, and respectfully decline to produce the body of the prisoner; and if it appears from said return, or said petition and return, that the prisoner is claimed to be held in good faith, in pursuance of the provisions of said statute, the judge or court issuing the writ has no jurisdiction or authority to proceed further, and no jurisdiction or authority to compel the production of the body of the prisoner, or to commit the party holding him for contempt in thus respectfully declining to produce the prisoner.

THE EFFECT OF THE PRODUCTION OF THE PRISONER would be to place him in the physical control of the court, and to deprive himself of all power to execute the superior commands of the laws of the United States, to which he owes obedience.

APPLICATION for a writ of *habeas corpus*. The opinion states the facts. Before Sawyer, circuit judge, and Sabin, district judge.

Alfred Clarke, for the petitioner.

J. D. Sullivan, district attorney, for the city and county of San Francisco, for sheriff.

W. M. Fitzmaurice, of counsel.

By the Court, SAWYER, Circuit Judge. W. L. Robb filed his petition in the circuit court for a writ of *habeas corpus*, in which he states "that he is unlawfully imprisoned, detained, confined, and restrained of his liberty by P. Connolly, sheriff of the city and county of San Francisco, at the city and county of San Francisco, in the state of California. That the said imprisonment, detention, confinement, and restraint are illegal; and that the illegality thereof consists in this, to wit: that petitioner is the duly appointed agent of the state of Oregon to convey to said state Charles H. Bayley, a fugitive from justice from said state, who is in the custody of this petitioner under a warrant issued by the governor of California, a copy of which warrant is hereto annexed and made a part of this petition. That on the twenty-first day of November, 1883, this petitioner was served with a writ of *habeas corpus* from the superior court of the city and county of San Francisco, commanding him to produce in said court said Charles H. Bayley. That petitioner respectfully informed said court by his return that he held said Bayley under the authority of the United States, and refused to produce said Bayley, and said superior

court committed petitioner therefor for an alleged contempt of its authority. Wherefore, petitioner is in custody for an act done in executing a law of the United States, and for refusing to do an act contrary to a law of the United States."

The warrant annexed to the petition, and made a part thereof, is the same, a copy of which, with the return thereon, is hereinafter set out in the commitment as a part of the judgment for contempt.

A writ of *habeas corpus* having been issued according to the prayer, and duly served, P. Connolly, sheriff, on January 11, 1884, made return, as follows:

"Now comes P. Connolly and makes this his return to the within writ, and shows that he holds the within named W. L. Robb under a commitment, a copy of which is hereto annexed and made a part hereof.

"P. CONNOLLY,
"Sheriff City and County of San Francisco.
"By M. F. CUMMINGS, Under-sheriff.

"Dated January 11, A. D. 1884."

The following is a copy of the commitment annexed to the return:

"In the superior court of the city and county of San Francisco, state of California, Department No. 1, Wednesday, November the 21st, A. D. 1883. Present, Hon. T. K. Wilson, judge. In the matter of the application of Charles H. Bayley, for a writ of *habeas corpus*.

"The application of Charles H. Bayley for a writ of *habeas corpus* coming on regularly to be heard, and it appearing to my satisfaction that a writ of *habeas corpus* was duly and regularly issued, directed to, and served upon one W. L. Robb, commanding him, the said W. L. Robb, to have and produce before me, the undersigned, one of the judges of the superior court of the city and county of San Francisco, at the court-room of Department Number One of said court, at the hour of half-past one o'clock P. M. of said day, the body of Charles H. Bayley, and at the time and place last aforesaid.

"The said W. L. Robb appearing by his counsel and submitting his return to said writ, *from which it appears that the said W. L. Robb holds the said Charles H. Bayley under the authority of the United States, under and by virtue of the following warrant:*

"'State of California, executive department. [Vignette.] The people of the state of California, to any sheriff, constable, marshal, or policeman of this state, greeting:

"'Whereas, it has been represented to me by the governor of the state of Oregon that C. H. Bayley stands charged with the crime of embezzlement, committed in the county of Clatsop, in said state, and that he has fled from the justice of that state, and has taken refuge in the state of California; and the said governor of the state of Oregon having, in pursuance of the constitution and laws of the United States, demanded of me that I shall cause the said C. H. Bayley to be arrested and delivered to W. L. Robb, who is authorized to receive him into his custody and convey him back to the state of Oregon; and whereas, the said representation and demand is accompanied by a certified copy of the information filed in the office of the justice of the peace of the precinct of Astoria, Clatsop county, state of Oregon, whereby the said C. H. Bayley stands charged with said crime and with having fled from said state and

taken refuge in the state of California, which is certified by the governor of the state of Oregon to be authentic;

"'You are, therefore, required to arrest and secure the said C. H. Bayley wherever he may be found within this state, and to deliver him into the custody of the said W. L. Robb, to be taken back to the state from which he fled, pursuant to the said requisition, he, the said W. L. Robb, defraying all costs and expenses incurred in the arrest and securing of said fugitive. You will make return to this department of the manner in which this warrant has been executed.

"'In witness whereof, I have hereunto set my hand and caused the great seal of the state to be affixed this the twentieth day of November, in the year of our Lord one thousand eight hundred and eighty-three.

[Seal.] "'GEORGE STONEMAN,

"'Governor of the State of California.

"'By the governor:

"'THOS. L. THOMPSON, Secretary of State.'

"'SAN FRANCISCO, CAL.

"'I hereby certify, that I have this day arrested the within-named C. H. Bayley, and delivered him to W. L. Robb, as herein demanded.

"'November 20, 1883. P. CROWLEY, Chief of Police.'

"And the said W. L. Robb has in his custody and possession the body of the said Charles H. Bayley, and is able to and can produce the said Charles H. Bayley before me at the time and place specified in and in accordance with the directions contained in said writ; and it further appearing that the said W. L. Robb willfully neglects and refuses to obey said writ of *habeas corpus*, or to have or produce the said Charles H. Bayley before the undersigned as above mentioned, and that no good or sufficient cause has been shown or exists for said refusal;

"It is, therefore, ordered and adjudged that the said W. L. Robb is guilty of contempt of this court, in refusing to obey said writ of *habeas corpus*, and refusing to have and produce the body of Charles H. Bayley before me at the time and place specified in said writ. And further ordered, that the sheriff of the city and county of San Francisco do forthwith arrest the said W. L. Robb, and confine him in the county jail of the city and county aforesaid until he, the said W. L. Robb, obeys said writ and produces the body of the said Charles H. Bayley before me, or until he be legally discharged.

"Given under my hand this twenty-first day of November, 1883.

"T. K. WILSON,

"Judge of Superior Court of the City and County of San Francisco, Cal."

At the hearing, a copy of the record of proceedings in the superior court, in which the judgment and commitment for contempt were had, was put in evidence, and it was agreed by counsel that this was the authority under which petitioner Robb is restrained of his liberty.

The record shows: 1. A petition to T. K. Wilson, judge of the superior court of the city and county of San Francisco, for a writ of *habeas corpus* by Charles H. Bayley, in which he alleges: "That he is unlawfully imprisoned, detained, confined, and restrained of his liberty by W. L. Robb, at the old city hall in the city and county of San Francisco, in the state of California. That the said imprisonment, detention, confinement, and restraint are illegal; and that the illegality thereof con-

sists in this, to wit: that petitioner *is held under a warrant of arrest, a copy of which is hereto annexed and made a part hereof*. That said warrant is issued without authority of law and against the law in this, that no copy of an indictment found, or affidavit made before a magistrate charging petitioner with any crime, has been produced to the governor of California."

The warrant of arrest issued by the governor of California, annexed to and made a part of the petition, is the same warrant hereinbefore set out as a part of the judgment and commitment for contempt, and the return of P. Crowley, chief of police, indorsed thereon, and need not be repeated.

2. A writ of *habeas corpus*, in the usual form, addressed to W. L. Robb, requiring him to produce the body of said Bayley, etc.

3. The return to the writ made by said Robb, petitioner herein, which is as follows:

"In the superior court of the city and county of San Francisco, state of California. Ex parte Charles H. Bayley. *Habeas corpus*.

"Now comes W. L. Robb, and makes this his return to the annexed writ, and shows that he holds the within-named prisoner under the authority of the United States, as will more fully appear on inspection of the warrant of the governor of California and a commission from the governor of Oregon, a copy of which is hereto annexed and made a part hereof, and the originals produced. Respondent respectfully refuses to produce said C. H. Bayley, on the ground that under the laws of the United States he ought not to produce said prisoner, because the honorable superior court has no power or authority to proceed further in the premises. W. L. Robb.

"Subscribed and sworn to before me this twenty-first day of November, 1883. J. F. Carpenter, Deputy County Clerk."

The warrant of the governor of California, annexed to said return and made a part thereof, is the same hereinbefore set out as a part of the judgment and commitment for contempt, and the return of P. Crowley, chief of police, indorsed thereon. The commission of the governor of Oregon, also annexed to said return and made a part thereof, is as follows:

"State of Oregon. [Vignette.] Executive department. To all to whom these presents shall come:

"Know ye, that I have authorized and empowered, and by these presents do authorize and empower, Walter L. Robb to take and receive from the proper authorities of the state of California one C. H. Bayley, fugitive from justice, and convey him to the State of Oregon, there to be dealt with according to law.

"In witness whereof, I have hereunto set my hand and affixed the great seal of the state, at the city of Salem, this fifteenth day of November, in the year of our Lord one thousand eight hundred and eighty-three.

"[Seal.] (Signed) Z. Z. Moody,
"Governor of the State of Oregon.

"By the governor:
"R. P. Earhart, Secretary of State."

The original of said commission of the governor of Oregon under the seal of the state of Oregon, and the original of the said warrant of the

governor of California under the seal of the state of California, were also produced and exhibited to the court at the time of making said return.

The constitution of the United States provides, that "a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime:" Art. 4, sec. 2.

The last clause of section 8 of article 1 confers upon congress power "to make all laws which shall be necessary and proper for carrying into execution * * all * * powers vested by this constitution in the government of the United States." And article 11 provides that "this constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land; and judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." Thus any laws passed by congress under those constitutional provisions for the arrest of fugitives from justice found in any state, and their delivery to the state from which they fled, are a part of the supreme law of the land, to which all state laws upon the subject must be subordinate. This power, like the power conferred in the same section to return fugitives from labor, the power to regulate foreign and interstate commerce, to declare war, raise armies, provide for a navy, make peace, etc., it was thought ought not to be intrusted to the states. State jealousies, and diverse state interests and policies, might prevent the return of fugitives from justice and labor, and to guard against inconvenience in these matters, the power was conferred upon the general government over these subjects, and it is supreme. So, also, the constitution provided for courts to administer the laws of the United States. In pursuance of the provisions cited relating to the return of fugitives from justice and labor, congress, in 1793, passed an act for the return of both classes of fugitives: 1 Stat. 302. Sections 1 and 2 of that act, relating to fugitives from justice, have been carried into the revised statutes of the United States, and constitute sections 5278 and 5279, which, so far as applicable to this case, read as follows:

"Sec. 5278. Whenever the executive authority of any state or territory demands any person as a fugitive from justice of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found, or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear."

"Sec. 5279. Any agent so appointed who receives the fugitive into his custody, *shall be empowered to transport him to the state or territory* from which he has fled. And every person who, by force, sets at liberty or rescues the fugitive from such agent, while so transporting him, shall be

fined not more than five hundred dollars, or imprisoned not more than one year."

When the governor of a state, acting under this statute, upon the demand of the authorities of another state, issues his warrant for the arrest of a party charged with a crime, and that party is arrested by any proper officer, and delivered over to the party empowered by the state where the offense was committed, to be carried to that state and delivered to its proper authorities, we have no doubt that the governor issuing the warrant, the officer executing it, and the party to whom he is delivered are acting by virtue and under the authority of the act of congress, and no other, and *pro hac vice* are officers or agents of the United States: Ex parte Smith, 3 McLean, 129; Prigg's Case, 16 Pet. 539. From the time of arrest till he is delivered to the authorities of the state demanding his surrender, the party is in the custody of the law—and that law a law of the United States, and the supreme law of the land. In this case Bayley had been arrested upon a warrant issued by the governor of California, on a demand by the governor of Oregon, and delivered into the custody of the petitioner, Robb, who was duly commissioned and authorized by the governor of Oregon to receive him and convey him to Oregon, which duty he was engaged in performing in pursuance of the provisions of the act of congress, when he was served with the writ of *habeas corpus* from the superior court, to which he made the return hereinbefore set out, stating that he held Bayley for the purpose of conveying him to Oregon, under and in pursuance of the laws of the United States, by virtue of the commission from the governor of Oregon, and the warrant of arrest of the governor of California, and arrest under it, annexing thereto copies of said documents, and exhibiting the originals, and respectfully declined to produce the body of Bayley on the expressed ground, that it appearing to the court that Bayley was in custody under the laws of the United States, the court had no jurisdiction to proceed further, or to require him to produce the body of said prisoner.

The court took a different view on this point, adjudged petitioner to be guilty of contempt in declining to produce the body of Bayley, and to be imprisoned until he should comply with the commands of the writ in this particular. If the court, after being informed of the cause of restraint, had jurisdiction and authority to proceed further, and compel the production of the body of Bayley, notwithstanding the facts shown, then the judgment for contempt is lawful, and petitioner must be remanded; but if it had no authority to proceed and compel the production of the body of Bayley, then it had no power to punish petitioner for contempt, and he could not be in contempt in not producing him, and the authority of the court to proceed, is the question to be determined. As we understand the decisions, this very question has been distinctly determined by the supreme court of the United States, under circumstances that compelled the most deliberate and mature consideration, in the cases of Ableman v. Booth, and United States v. Booth, 21 How. 507. In the first case, Booth had been arrested for an offense against the laws of the United States, and held to answer by a court commissioner and committed to the custody of the marshal of the district. A justice of the supreme court of Wisconsin discharged Booth from custody on *habeas corpus*, on the ground that the act under which Booth was held was unconstitutional and void, and his action was affirmed by the state supreme court. Booth was then indicted and tried and con-

victed in the United States district court for the district of Wisconsin, and sentenced to imprisonment, whereupon the same justice of the supreme court of the state discharged him again on *habeas corpus*, on the same grounds as before; which action was also affirmed by the supreme court of the state. This action of the justice of the supreme court, and of the supreme court of the state, was reversed by the supreme court of the United States, upon the ground that the court and justice were wholly without jurisdiction to consider these matters. So earnest was the supreme court of Wisconsin in its determination to maintain its authority, that it even disobeyed the writ of the United States supreme court, commanding it to send up its record, and peremptorily ordered its clerk not to send a transcript of the record, which order was obeyed; and the cases were heard upon copies of the records, permitted by the supreme court to be filed, upon affidavits stating the facts.

In discussing the powers of the state and national courts, the court, speaking by its chief justice, says: "If the judicial power exercised in this instance has been reserved to the states, no offense against the laws of the United States can be punished by their own courts without the permission and according to the judgment of the courts of the state in which the party happened to be imprisoned; for if the supreme court of Wisconsin possessed the power it has exercised in relation to offenses against the act of congress in question, it necessarily follows, that they must have the same judicial authority in relation to any other law of the United States; and consequently, their supervising and controlling power would embrace the whole criminal code of the United States, and extend to offenses against our revenue laws, or any other law intended to guard the different departments of the general government from fraud or violence. And it would embrace all crimes, from the highest to the lowest, including felonies, which are punished with death, as well as misdemeanors, which are punished by imprisonment. And moreover, if the power is possessed by the supreme court of the state of Wisconsin, it must belong equally to every other state in the Union, when the prisoner is within its territorial limits; and it is very certain that the state courts would not always agree in opinion; and it would often happen, that an act which was admitted to be an offense, and justly punished, in one state, would be regarded as innocent, and indeed as praiseworthy, in another.

"It would seem to be hardly necessary to do more than state the result to which these decisions of the state courts must inevitably lead. It is, of itself, a sufficient and conclusive answer; for no one will suppose that a government which has now lasted nearly seventy years, enforcing its laws by its *own tribunals*, and preserving the union of the states, could have lasted a single year, or fulfilled the high trusts committed to it, if offenses against its laws could not have been punished without the consent of the state in which the culprit was found.

"The judges of the supreme court of Wisconsin do not distinctly state from what source they suppose they have derived this judicial power. There can be no such thing as judicial authority, unless it is conferred by a government or sovereignty; and if the judges and courts of Wisconsin possess the jurisdiction they claim, they must derive it either from the United States or the state. It certainly has not been conferred on them by the United States; and it is equally clear, it was not in the power of the state to confer it, even if it had attempted to do so: for

no state can authorize one of its judges, or courts, to exercise judicial power by *habeas corpus*, or otherwise, within the jurisdiction of another and independent government. And although the state of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the constitution of the United States. And the powers of the general government and of the state, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is far beyond the reach of the judicial process issued by a state judge or a state court, as if the line of division was traced by landmarks and monuments visible to the eye. And the state of Wisconsin had no more power to authorize these proceedings of its judges and courts than it would have had if the prisoner had been confined in Michigan, or in any other state of the Union, for an offense against the laws of the state in which he was imprisoned:" 21 How. 514. Again: "Questions of this kind must always depend upon the constitution and laws of the United States, and not of a state. The constitution was not formed merely to guard the states against danger from foreign nations, but mainly to secure union and harmony at home; for if this object could be attained, there would be but little danger from abroad, and to accomplish this purpose it was felt by the statesmen who framed the constitution, and by the people who adopted it, that it was necessary that many of the rights of sovereignty, which the states then possessed, should be ceded to the general government, and that in the sphere of action assigned to it, it should be supreme and strong enough to execute its *own laws by its own tribunals*, without interruption from a state or from state authorities. And it was evident that anything short of this would be inadequate to the main objects for which the government was established; and that local interest, local passions or prejudices, incited and fostered by individuals for sinister purposes, would lead to acts of aggression and injustice, by one state upon the rights of another, which would ultimately terminate in violence and force, unless there was a common arbiter between them, armed with power enough to protect and guard the rights of all, by appropriate laws, to be carried into execution peacefully by its judicial tribunals:" 21 How. 516, 517.

After showing the relation of the state and national courts to each other, and to the laws of the United States passed within the scope of the powers of the national government, the court, in language so clear and precise that it can not well be misunderstood, lays down the rule directly applicable to this case, as follows: "We do not question the authority of the state court, or judge, who is authorized by the laws of the state to issue the writ of *habeas corpus*, to issue it in any case where the party is imprisoned within its territorial limits, *provided it does not appear, when the application is made, that the person imprisoned is in custody under authority of the United States*. The court, or judge, has a right to inquire, in this mode of proceeding, for what cause, and by what authority, the prisoner is confined within the territorial limits of the state sovereignty. And it is the duty of the marshal, or *other person* having the custody of the prisoner, to make known to the judge, or court, by a proper return, the authority by which he holds him in custody. This right to inquire by process of *habeas corpus*, and the duty of the officer to make a return, grows, necessarily, out of the complex character of our government, and

the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each, within its sphere of action prescribed by the constitution of the United States, independent of the other. *But, after the return is made, and the state judge or court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of habeas corpus, nor any other process issued under state authority, can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States.* If he has committed an offense against their laws, their tribunals alone can punish him. *If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress.* And although, as we have said, it is the duty of the marshal, or other person holding him, to make known, by a proper return, the authority under which he detains him, *it is at the same time imperatively his duty to obey the process of the United States, to hold the prisoner in custody under it, and to refuse obedience to the mandate or process of any other government. And, consequently, it is his duty not to take the prisoner, nor suffer him to be taken, before a state judge or court upon a habeas corpus issued under state authority. No state judge, or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them.* And if the authority of a state, in the form of judicial process, or otherwise, should attempt to control the marshal, or *other authorized officer or agent* of the United States, in any respect, in the custody of his prisoner, *it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference. No judicial process, whatever form it may assume,* can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued; *and an attempt to enforce it beyond these boundaries is nothing less than lawless violence:*" 21 How. 523.

This decision was fully affirmed nearly twenty-five years afterward, in Tarble's Case, 13 Wall. 397. Tarble had enlisted in the United States army, deserted, and been arrested; and he was restrained of his liberty on that ground, by Lieutenant Stone, in charge of the station. A writ of *habeas corpus* having been issued by a state commissioner having jurisdiction to issue such writs, and served, Lieutenant Stone made return that the petitioner had enlisted, deserted, and been captured, and he claimed to hold him rightfully as a soldier under the laws of the United States. It was replied that he was a minor under eighteen years of age; that he had been inveigled into enlisting without the consent of his father, and that the enlistment was void, on this and other grounds set out, and it was claimed that the petitioner was unlawfully restrained of his liberty. The commissioner took testimony, heard the case, and discharged him. The proceedings of the commissioner were affirmed by the supreme court of Wisconsin. The judgment of the state supreme court was subsequently reversed by the supreme court of the United States, after an elaborate review of the questions involved, not on the ground that the state commissioner and court had erred on the facts, or the unlawfulness of the imprisonment, but upon the ground that they had no right, or jurisdiction, to examine or determine the question as to the lawfulness of the imprisonment at all, after the fact was brought

to the attention of the court issuing the writ that the officer, in good faith, claimed to hold him under authority of the laws of the United States—that upon these facts appearing the jurisdiction was ousted. Said the court upon this question: "State judges and state courts, authorized by laws of their states to issue writs of *habeas corpus*, have, undoubtedly, a right to issue the writ in any case where a party is alleged to be illegally confined within their limits, *unless it appear upon his application that he is confined under the authority, or claim and color of the authority, of the United States, by an officer of that government. If such fact appear upon the application, the writ should be refused. If it do not appear, the judge or court issuing the writ has a right to inquire into the cause of imprisonment, and ascertain by what authority the person is held within the limits of the state; and it is the duty of the marshal, or other officer having the custody of the prisoner, to give, by a proper return, information in this respect.* His return should be sufficient, in its detail of facts, *to show distinctly that the imprisonment is under the authority, or claim and color of the authority, of the United States,* and to exclude the suspicion of imposition or oppression on his part. And the process, or orders, under which the prisoner is held, should be produced with the return, and submitted to inspection, in order that the court, or judge, issuing the writ, may see that the prisoner is held by the officer in good faith, under the authority, or claim and color of the authority, of the United States, and not under the mere pretense of having such authority."

An attempt was made, upon other authorities cited, to distinguish the case from Booth's cases, and to *limit* the application of the doctrines established by them; but the court emphatically repudiated any such limitation, as appears by the following explicit language: "Some attempt has been made in adjudications, to which our attention has been called, to limit the decision of this court in Ableman v. Booth, and The United States v. Booth, to cases where a prisoner is held in custody under *undisputed lawful authority of the United States, as distinguished from his imprisonment under claim and color of such authority. But it is evident, that the decision does not admit of any such limitation.* It would have been unnecessary to enforce, by any extended reasoning, such as the chief justice uses, the position that when it appeared to the judge, or officer issuing the writ, that the prisoner was held under undisputed lawful authority, he should proceed no further. No *federal* judge, *even*, could, in such case, release the party from imprisonment, except upon bail when that was allowable. The detention being by admitted lawful authority, no judge could set the prisoner at liberty, except in that way, at any stage of the proceeding. All that is meant by the language used is, that the state judge, or state court, *should proceed no further when it appears, from the application of the party, or the return made, that the prisoner is held by an officer of the United States under what, in truth, purports to be the authority of the United States;* that is, *an authority, the validity of which is to be determined by the constitution and laws of the United States.* If a party thus held be illegally imprisoned, it is for the courts or judicial officers of the United States, and those courts or officers alone, to grant him release." The court concludes: "It follows, from the views we have expressed, that the court commissioner of Dane county *was without jurisdiction to issue the writ of habeas corpus for the discharge of the prisoner in this case, it appearing, upon the application presented to him for the writ, that the prisoner was held by an officer of the United States under claim and color of the au-*

thority of the United States, as an enlisted soldier mustered into the military service of the national government; *and the same information was imparted to the commissioner by the return of the officer.* The commissioner *was, both by the application for the writ and the return to it, apprised that the prisoner was within the dominion and jurisdiction of another government; and that no writ of habeas corpus issued by him could pass over the line which divided the two sovereignties.* The conclusion we have reached renders it *unnecessary to consider how far the declaration of the prisoner as to his age, in the oath of enlistment, is to be deemed conclusive evidence on that point on the return to the writ.*"

Now the case of the petitioner in this proceeding, except that the officer or agent of the United States having Bayley in charge is neither a judge, commissioner, nor military officer, acting under the judiciary or military laws of the United States, but a person expressly authorized to act by other statutes of the United States, is precisely in the condition of Tarble's case. The petition of Bayley on its face showed that he *was claimed,* at least, to be held in custody in pursuance of the laws of the United States. It was so explicitly stated in the petition, and a copy of the warrant showing the authority was annexed to and made a part of the petition for the writ; and this being so, if the doctrine asserted in the Booth and Tarble cases is correct—and whether correct or not it is controlling in this court—then in the language of the court in Tarble's case, already quoted, the judge who issued the writ to the petitioner "*was without jurisdiction to issue the writ of habeas corpus for the discharge of the prisoner in this case,* it appearing, upon the application presented to him for the writ, that the prisoner was held by an officer," or agent, "of the United States, under claim and color of authority of the United States," as a fugitive from justice, to be delivered over to the authorities of the state of Oregon. But if it were necessary to go further, the petitioner did exactly what the supreme court of the United States said he was bound to do under such circumstances, and made return to the writ showing his authority, giving copies of his commission from the governor of Oregon, and warrant from the governor of California, and return of the chief of police; and exhibited the originals under the seals of the respective states, his authority thus appearing upon the representations of both the petitioner and the party restraining him of his liberty; and this state of facts satisfactorily appeared to the court, for the court itself so adjudged in its judgment for contempt. And the petitioner further did exactly what the supreme court of the United States said he must do, respectfully declined to produce the body of the prisoner. Fortunately, he did not have occasion to go further, as the court said he must do, if necessary, and resist by all the force at his command any attempt to compel a production of his body, other than to defend himself in the courts in response to the writ of *habeas corpus* issued to and served upon him, and to the proceedings for contempt now under consideration.

Now if it was lawful for petitioner to decline to produce the body of Bayley upon the facts disclosed to the court upon the face of the petition itself, or upon the face of the petition and the return made to the writ; if it was lawful to resist by force, with all the power at his command, any attempt to compel him to produce the body of the prisoner; if, upon the facts of the case appearing, as they did appear, the judge had no jurisdiction to proceed further or examine at all into the regularity of the proceeding under which Bayley was held—then there certainly was no

jurisdiction or lawful authority to force a production of Bayley through proceedings for contempt. The two propositions are incompatible, and their co-existence legally impossible.

There is strong reason for maintaining this position. If a judge of a state court—another sovereignty as distinct from the national sovereignty as if it ruled over a different territory—can, under the circumstances indicated, compel the production of a prisoner held under the laws of the United States—the supreme law of the land—he has the physical power to discharge him when produced, however lawless the discharge may be, as was done, in fact, in the Booth and Tarble cases. The production of the body in court, by means of which the court has the physical power to assume control, is equivalent to a surrender of a prisoner. And if one person can be discharged by a state officer, so can all, and it would be impossible for the United States, in some contingencies, to discharge the duty imposed upon them by the national constitution relating to fugitives from justice, as well as to fugitives from labor; or to execute the laws of congress passed to give effect to those constitutional rights of the several states, as between themselves. It would be as difficult to perform their duties as the supreme court in Booth's cases said it would be to execute the criminal laws of the United States under similar conditions.

By producing the body as required by the writ, the petitioner necessarily places his prisoner within the control of the court issuing it, and deprives himself of all power to perform the requirements of his commission, enjoined by the superior authority of the laws of the United States. He can not, and he does not, owe a divided duty to two distinct sovereignties. He can not serve two masters. He can not produce his prisoner, which is equivalent to his surrender, in obedience to the commands of the writ of *habeas corpus*, and at the same time retain power to obey the mandate of the laws of the United States and deliver him to the authorities of the state of Oregon. He must obey one command or the other, and the command to be obeyed is the one which is superior or supreme in its authority.

But whether these reasons and others given are sound or not, the rule as to the jurisdiction of the state courts, under the circumstances indicated, appears to us to be clearly established by the highest tribunal in the land, and are not open even to question here, and can not be disregarded by us.

We are of opinion, under the authoritative decisions cited, that the judge of the superior court on the petition of Bayley, as presented, had no jurisdiction to issue the writ, and certainly, upon the petition and the return made to the writ by Robb, that neither the judge nor the court over which he presides had jurisdiction or authority to proceed further, or to compel the production of the body of Bayley, or to punish him for contempt for respectfully declining to produce the body under the circumstances of the case, in pursuance of the commands of the writ.

We should not have thought it necessary to go into the case so fully, or to have done anything beyond referring to the Booth and Tarble cases, but we found ourselves in the delicate, embarrassing, and very unpleasant position of reaching a conclusion different from that attained by the supreme court of the state in this case, for whose judgment we entertain the very highest respect. That tribunal held, on a writ of *habeas corpus* heretofore issued on petition of Robb, that the superior court

had jurisdiction and authority to compel petitioner, by imprisonment for contempt, to produce the body of his prisoner, Bayley: In re Robb, 1 W. C. Rep. 255. Had there been no decisions of the supreme court of the United States settling the question, as we conceive there are, we certainly should have hesitated long before declining to follow this ruling of the supreme court of the state. But where that court differs from the supreme court of the United States as to rights depending upon the statutes of the United States, over which the latter court has final jurisdiction, and we must follow one or the other, as we must do in this case, our duty is to yield obedience to the latter.

As no reference is made to the Booth and Tarble cases in the opinion of the supreme court of the state, those cases may not have attracted the attention of the court.

The prisoner is entitled to be discharged from imprisonment, and it is so ordered.

In the Supreme Court of the United States.

October Term, 1883.

W. L. ROBB, *Plaintiff in Error,*
versus
PATRICK CONNOLLY, *Defendant in Error.*
No. 1,258.

ARGUMENT FOR PLAINTIFF.

The plaintiff was discharged from custody, Jany. 19th, 1884, by the U. S. circuit court, but he is unable to remove his prisoner Bayley to Oregon as required by the laws of the United States, because section 364 of the penal code of California reads as follows:

"§ 364. *Every person having in his custody* or under his restraint or power, *any person for whose relief a writ of habeas corpus has been issued, who,* with the intent to elude the service of such writ or to avoid the effect thereof, transfers such person to the custody of another, or places him under the power or control of another, or conceals or changes the place of his confinement or restraint, or *removes him without the jurisdiction of the court,* or judge *issuing the writ, is guilty of a misdemeanor.*"

It will be seen that under this section the plaintiff is prohibited from taking Bayley out of the state and is subject to a fine of $500 and imprisonment for six months, if he does so.

He has already incurred a like penalty for violating section 362 of the penal code of California, which reads as follows:

"§ 362. Every officer or person to whom a writ of habeas corpus may be directed, who, after service thereof, neglects or refuses to obey the command thereof, is guilty of a misdemeanor."

For violating this section in attempting to execute the laws of the United States, as set forth in the transcript and in the opinion of the circuit court of the United States pages 79–92 ante (ex parte Robb 1. West Coast Reporter, 439) a prosecution is now pending against this plaintiff and the sheriff (the defendant herein) holds a warrant for his arrest, which warrant is as follows:

WARRANT.

"State of California, City and County of San Francisco Police Judge's Court, ss. The People of the State of California, to any Sheriff, Constable, Marshal, or Policeman in this State:

A complaint upon oath having been this made before me, H. Watson Webb, Police Judge, by Charles H. Bayley, that the offence of refusing to obey a writ of *habeas corpus ad subjiciendum,* issued Nov. 21st, 1883, by the superior court of the city and county of San Francisco, directed to W. L. Robb, and served on said W. L. Robb, November 21st, 1883, commanding said Robb to produce Charles H. Bayley forthwith, has been committed, and accusing W. L. Robb, thereof, you are therfore commanded forthwith to arrest the above named accused and bring him before me forthwith, at the police judge's court, in the City Hall in this city and county of San Francisco.

"Witness my hand and the seal of the police judge's court of the city and county of San Francisco, this 12th day of February, A D. 1884.

[L. S.] H. WATSON WEBB, Judge of the police judge's court of the city and county of San Francisco."

If the plaintiff persists in his attempt to execute the laws of the United States by removing Bayley to Oregon, as required by the process which he holds, and the judicial power of California persists in interfering with the plaintiff in the execution of the federal laws, a conflict of jurisdiction is evolved pregnant with disastrous results and injurious to the public interests.

The plaintiff claims that it is inconsistent with his duty, and the supremacy of the federal government, to surrender his prisoner Bayley or to desist from his effort and attempt to remove him to the state of Oregon, as required by the process which he holds.

REVIEW OF PLAINTIFF'S AUTHORITIES.

We have arranged our authorities chronologically.

The first line of cases, pages 11 to 51 ante, are presented in support of point ONE; and the second line of cases, pages 51 to 92 ante, are presented in support of point TWO.

Many of the cases cited, support both points, and a complete separation was not practicable.

1st. *Was Robb acting under the authority of the United States?*

A. D. 1814. Willard's case, page 11 ante, is clear and decisive in the affirmative.

A. D. 1820. Houston v. Moore, page 11 ante, holds that the jurisdiction of a national matter is vested exclusively in the national courts.

A. D. 1822. Com. v. Green, page 11 ante, recognizes the national constitution as the source of the obligation for surrender of fugitive criminals.

A. D. 1832. John L. Clark's case, page 11 to 14 ante, is a leading case frequently cited in subsequent decisions. It is remarkable for the clearness with which it states the ground on which the state court took jurisdiction of a matter arising under the constitution and laws of the United States. "Our duties" (say the court) "are to be found in our statutes" (of the state of New York) "they direct that the court authorized to allow the habeas corpus shall proceed to examine the return." * *

"The provisions of our statute seem to contemplate an imprisonment upon a charge of an offence against our own laws, but the prisoner is entitled to the benefit of those provisions so far as they are applicable."

We call attention to the fact that the supreme court of New York, which, so far as recent books show, was the pioneer whose sturdy courage blazed through the unbroken forest the way in which many of the state courts have travelled ever since, does not rest its claim to exercise jurisdiction over a fugitive from justice on the ground, that the state had reserved that right and had not granted it to the national government, or on the ground that the national government had granted that judicial power to the state, or because there was precedent for its exercise, or because there was authority other than that cited, namely the statute of the state of New York.

We contend that the statute of New York (and the same contention will apply to the statutes of California and all the other states) do not purport to give, and could not give if they did so purport, any judicial power to state officers to interfere by habeas corpus with the execution of the laws of congress.

This rule of law has been so clearly settled A. D. 1858 in Ableman v. Booth and A. D. 1871 in re Tarble, both decided by the supreme court of the United States, that it cannot be considered open to question now.

But we remark that the supreme court of New York in 1832 did not have the benefit of the Booth and Tarble decisions, when it took jurisdiction of John L. Clark.

The relative powers and duties of the national and state governments were imperfectly understood between the years 1832 and 1871 as we find by the frequent attempts of state courts and legislatures to interfere with the execution of the laws of the United States.

A. D. 1840. State v. Allen, page 14 ante, is clear and concise that interstate extradition springs from the constitution and laws of the United States.

A. D. 1842. Prigg,s case pages 14 to 18 ante is an incomparable exposition of the nature of the obligation to surrender fugitives from justice, and it clearly demonstrates that it is an act of federal power. No epitome which we could make would do it justice, we must refer to the extracts on the preceding pages.

A. D. 1842 Smith's case pages 18 to 21 ante. This great case is an express authority in favor of the jurisdiction of the federal courts.

We would pause here to ask whence the circuit court of the United States derived its jurisdiction ?

The second congress of the United States, composed of men familiar with the meaning, objects and purposes of the federal constiturion, and aided by the advice of the immortal Washington, devolved upon the governor, the chief magistrate, who never dies, the duty of surrendering the fugitive from justice. The danger which awakened the supreme court of California in A. D. 1855 (re Manchester) was not apparent to the revolutionary fathers in A. D. 1793, or if it was we must presume they weighed its consequences and accepted its results.

Neither the constitution nor act of congress confide the surrender to the state, if they did it might be claimed that the state legislature might provide how the surrender should be made, and the governor might execute, and the state judiciary examine or watch (re Manchester) the execution of the law.

We claim that in surrendering a fugitive criminal the governor exercises federal power, and is subject to the scrutiny and judicial control of the federal courts.

No judicial power is bestowed or devolved on the state judiciary. We contend that the judicial power passed from the states through the national constitution to the federal courts, and that the grant of power was without reservation, and consequently there was no residuum left in the state courts.

A. D. 1846. In Buzine's case, page 21 ante, the court held that the

national obligation included the power to imprison and detain the fugitive for a reasonable time in anticipation of a demand for his surrender.

A. D. 1846. Schlemn's case, pages 21-22 ante. This is one of the cases cited by the supreme court of California in support of the decision we are now attempting to reverse. We think it is strongly in our favor. It holds the governors warrant conclusive and the fugitive disentitled to the writ of habeas corpus from the state court.

A D. 1852. Fetter's case, pages 22-23 ante, expressly declares the paramount obligation of the constitution and the right of preliminary detention &c.

A. D. 1853. Johnson v. Riley, pages 23-24 ante, is a strong assertion by a state court of the supreme authority of the federal constitution and the obligation which it creates to surrender fugitives from justice.

A. D. 1855. Manchester's case, page 24 ante, is remarkable for the boldness with which it asserts the right of the judiciary of the state to watch the governor and set aside his acts, when he attempts to perform the duties cast upon him by the act of congress of 1793, which has been re-enacted by section 5278 of the revised statutes of the United States. It follows with a rather noisy tread in the wake of the John L. Clark case and asserts that the constitution of California has not denied the state courts jurisdiction in interstate extradition cases. "The very object of the habeas corpus was to reach just such cases." We claim there is more error in the Manchester decision than in any we have cited.

We deny that the object of the state writ of habeas corpus is to reach this class of cases, and we claim that the constitution of California did not distribute and could not have distributed any power to the state judiciary over a subject, which under the federal government was remitted to the federal judiciary. "The judicial power of the United States shall extend to all cases in law and equity arising under this constitution, the laws of the United States," etc, and is exclusive. Houston v. Moore, p. 11, ante; State v. McBride, 54, ante; Re Robb, 79-92, ante; and many other cases.

The state is under no obligation to deliver the fugitive, the executive is; because congress has selected him as the agent through whose action the national constitution is executed in the delivery of the fugitive.

The Manchester decision was delivered at a time when the relations of the states to the national government were greatly strained. The prevailing opinion in the state courts was in favor of their exercise of jurisdiction by habeas corpus when persons were held under federal authority, "as in case of persons held under color of process from the courts of the United States, or whose services and the custody of whose person are claimed under authority derived from the laws of the United States, as constantly done in cases of soldiers and sailors held by military and naval officers under enlistments complained of as void." Sims' case, page 58, ante. It was this general assertion of state jurisdiction by many of the state courts which called from Justice Nelson the lucid and decisive charge to the grand jury which

we have cited on page 56 ante, in which he says "It is the duty of the officer holding a prisoner under federal authority not to give him up or allow him to pass from his hands at any stage of the proceeding." The same assertion of state jurisdiction culminated in Wisconsin, in the discharge by the state court of a man convicted and sentenced by the district court of the United States. But as we remarked of the John L. Clark decision, the court which gave the Manchester decision had not the benefit of the decision in the Booth and Tarble cases. The error in the Manchester case is apparent, and the key is found in the opinion of the court that the "power to surrender a fugitive criminal ought not to be entrusted to the executive alone." The court labored under the mistake that it could correct (what seemed to it to be) the error of the congress of A. D. 1793, and that it could interject some of its "judicial comity" into a proceeding which, under the federal constitution and act of congress is sedulously protected from this very kind of interference. This decision, like a false light on the shore, has been making shipwrecks ever since, and as we reach these wrecks we will remember it.

A. D. 1856. Botts v. Williams, page 24, ante, recognizes the federal constitution as the source of the obligation to surrender a fugitive criminal.

A. D. 1858. Re Edwards, page 24, ante, shows the willingness of the state court to entertain objections to the constitutionality of the act of congress of 1793, after it had been held constitutional by the supreme court of the United States in Priggs case, page 17, ante.

A. D. 1858 Re Greenough, page 25, ante, is the voice of Vermont in favor of the authority of the national constitution.

A. D. 1860. Kentucky v. Dennison, page 25, ante, is a most important case (no extract can do it justice) and shows, inter alia, that "it devolved on congress to provide by law for the execution of this compact." The reasoning of this decision is unanswerable and convincing.

A. D. 1863. Re Romaine, page 26, ante, shows how near the supreme court of California came to differing with the supreme court of the United States. The act of 1793 had been examined in the Prigg and Dennison cases, already referred to, and the supreme court of the United States in both cases was satisfied with its constitutionality; yet, says the California supreme court, "no power is conferred on congress."

How powerful is the reasoning in Kentucky v. Dennison, "for if it was left to the states each might require different proof," etc. We think we may well say that if the judicial power over this subject was left to the state courts, each might establish a different rule of construction, as they would be (practically) subject to no common power of correction.

A. D. 1866. Donohue's case, page 27, ante, is another tribute to the supremacy of the federal constitution.

A. D. 1867. Re Hughes, page 27, ante, is clear on the federal nature of the obligation, and directly opposed to Governor Seward's opinion, which we quote on page 24, ante. But while we find that

the interpreters differ as to the meaning of the rule, we find they all agree that the rule is to be found in the federal constitution and law.

A. D. 1867. The Voorhees case, pages 27 to 31, ante, is too long for a review and too valuable to be omitted, and is in unison with the other authorities that extradition is an act of federal power.

A. D. 1872. Taylor v. Taintor, page 31, ante, is another exposition by the supreme court of the United States of the nature and manner of executing this obligation of the national constitution.

A. D. 1873. Brown's case, pages 31-3, ante, is a strong decision as to the source and nature of the obligation of interstate extradition.

A. D. 1874. Jones' case, page 33, ante, is directly opposed to Schlemn, page 21, ante. The Schlemn case holds the governor's mandate conclusive; the Jones case asserts the right of the state court to review the governor's action, thus following the Manchester case, already noticed.

A. D. 1874. The Brady case, page 33, ante, deserves more than a passing notice. It is one of the authorities cited by the supreme court of California in the case we are now seeking to reverse. It is not an authority on the jurisdiction of the state court, or the power to compel the production of the body.

The jurisdiction of the state courts to go behind the governor's mandate, was conceded by both counsel, and exercised by the court without question or decision as to its legality.

There was no point made about the production of the body, and consequently no decision thereon. The prisoner was voluntarily produced by the officer. The case is in line with all the others on our point, that "extradition rests exclusively on the federal constitution and the act of congress of 1793."

A. D. 1874. Morton v. Skinner, pages 33-34 ante, is the voice of the supreme court of Indiana, that our subject is one coming within the constitution and laws of the United States.

A. D. 1875. Case of Hibler, pages 34 35 ante, is in accord with all the others, as to the federal nature of the obligation, and the facility with which the state writ of habeas corpus may be misused, for the purpose of thwarting "the due execution of this duty."

A. D. 1875. Cubreth's case, page 35 ante, does not agree with the Buzine and Fetter cases, as to the right of preliminary detention, but it is clear as all the others on the paramount duty of the *state* (governor?) to make the surrender on proper demand.

A. D. 1876. The case of Titus, pages 35-9 ante, is an express adjudication on an issue joined, that the authority for extradition is conferred by the laws of the United States and by no other laws. The discharge of McDonald and arrest of Titus by the state court are a strong commentary on the interference, by the state courts, with the execution of the national laws, and tend to explain why agents acting under § 5279 revised statutes of the United States, have had to hire special conveyances, and avoid the usual lines of travel, in order to escape the interference of the state courts with the execution of the laws of the United States.

A. D. 1876. Rosenblatt's case, page 39 ante, is a testimony by the

supreme court of California, that "a state (query? the governor) is bound, under the constitution and act of congress, to surrender a fugitive."

A. D. 1876. Re Briscoe, pages 39 to 42 ante, is explicit as to the federal source of the extradition power. It furnishes, to the truth, which we present, another witness in the person of the governor of New York, who said, "I deny with great respect the right of the court to issue said writ of certiorari to me, or to review directly my action in discharging the duty imposed on me by the constitution of the United States, with respect to fugitives from justice." True the court decides in favor of its jurisdiction, but as it gives the ground of its decision, we can easily see its incorrectness.

It cites the habeas corpus act of the state, and then says, that, "as the next section does not take the case of a person sought to be extradited out of the operation of the statute, it necessarily follows that the court has power to inquire."

This is substantially the same claim of juridiction made in the John L. Clark and Manchester cases, and we think we have already demonstrated its fallacy.

We cannot say, as we said of the Clark and Manchester decisions, that the court had not the benefit of the Booth and Tarble cases, but we may say as afterwards was said by an eminent jurist in a case, with which we are familiar, "as no mention is made in the opinion of the court of the Booth and Tarble cases, perhaps those cases may not have attracted the attention of the court" when it "felt constrained to assert its power to examine into the detention of a prisoner held on the mandate of the governor, issued under the power conferred on him by the national law."

"The executive may err"—alas for human frailty, so may the state courts. The discordant and contradictory decisions, we have cited, are sufficient proof that error is not unknown to the state judiciary, but the courts, which gave the Manchester and Briscoe decisions, might have considered, that there is a wide difference between a law which congress had power to pass, even though the law might be deemed impolitic by a very few, who perhaps never studied the subject, and which can be revised or repealed by any subsequent congress, and an assertion of jurisdiction by the state courts of a matter nowhere confided to them, but on the contrary expressly removed from their cognizance by operation of the constitution of the United States.

The governor, in the execution of the law of congress, is as firmly bound not to transcend the law as are the state judiciary in the discharge of the duties properly confided to them. There is no such thing as arbitrary will in either case; but the distinction which escaped the notice of the court in the Briscoe case is this: that when the governor acts in an extradition case he does so by virtue of a law of congress of indisputable authority, and subject to review by the courts of the United States, whereas, when the state courts are attempting to review his action they are, without color of authority, trenching on the jurisdiction confided exclusively to the federal courts,

nowhere reserved from the national government and nowhere confided to the state judiciary. As might have been expected, the court cite the Manchester case, which we have already examined in support of its decision. The Brady case is also cited, but we think erroneously, because if through stipulation or misapprehension of counsel, the jurisdiction of the court was admitted and assumed *where it did not exist*, such a case cannot be cited as a decision and authority in favor of the exercise of the jurisdiction. We say it is not an authority; it is, at most, an example, and we think a very bad one. We refer to the full report of the Brady case, 56 N. Y. 182.

A. D. 1877. Work v. Corrington, page 42, ante, is the voice of Ohio in support of the national constitution as the foundation of the power of extradition.

A. D. 1877. Davis' case, pages 42-3, ante, is another Massachusetts case which concedes the laws of the United States to be the source and measure of the extradition power.

A. D. 1877. Bull's case, pages 44-8, ante, holds that the question of jurisdiction would be regarded as no longer debatable in the federal courts. The governor of Illinois demanded Blair as a fugitive from justice from the governor of Nebraska. Bull and Turtle took Blair from Nebraska to Liverpool on an extradition mandate issued by the governor of Nebraska to remove Blair to Illinois. They were indicted in Nebraska for kidnapping, and discharged on habeas corpus by the United States district court, because the acts done by them in Nebraska were done under the constitution and laws of the United States. The case is worthy of a careful reading.

A. D. 1879. Leary's case, pages 48 and 76-78, ante, dissents from and practically overrules the Brady case, which we have already reviewed The Brady case is one of the authorities cited against us by the court below.

A. D. 1879. Pinkerton's case, page 49, ante, is another reference to the constitution and laws of the United States as the foundation of the extradition power.

A. D. 1880. Hoyle's case, pages 49-51, ante, is an explicit decision in favor of our contention. When the agents of Georgia claim the custody of Hoyle under the extradition mandate of the governor, "it is to be presumed that the state court will recognize the authority so claimed is under the constitution and laws of the United States precisely as heretofore in the case of a fugitive slave, and that the regularity and propriety of its exercise can only be inquired into in the national tribunal." We cannot condense it, and must refer to our quotation.

A. D. 1881. Donohue's case, page 51, ante, is the last New York case which we have noticed. Like the others, it refers to the constitution and laws of the United States as the test of the extradition. But we notice that in 1879, in Pinkerton's case, and 1881, in Donohue's case, the court of appeals sustained the governor in refusing to produce the extradition demand. This course of procedure practically overrules the Briscoe case. What use is the habeas corpus when the court has no power to arrive at the facts on which the decision ought to rest?

The Donohue case is cited against us in the decision of the court below. If it does not sustain us, or if in the slightest manner it sustains the opinion which we seek to reverse, we confess our inability to discover it. We refer to the case, 84 N. Y. 442.

The cases which we have briefed are not all that we could find, but they are all which were conveniently accessible. We have not selected those favorable to our views, leaving out those which were adverse, but we have preferred to cite those we thought adverse and point out where we think they are erroneous.

2d *Had the superior court jurisdiction to compel plaintiff to produce Bayley, who was in the custody of plaintiff under the authority of the United States?*

Plaintiff has cited the following cases.

A. D. 1807. State v. Plime, pages 51-2 ante, in which the state court held, that, "when the prisoner was in custody under a law of the United States, the state court could not investigate the matter."

A. D. 1809. Re Roberts, page 52 ante. "The proceeding is under the constitution and laws of the United States, the state court has no right to interfere."

A. D. 1812. Re Ferguson, pages 52-3 ante. "We have either no jurisdiction, or a completely concurrent jurisdiction in all cases of unlawful imprisonment under color of an authority of the United States."

A. D. 1816. Re Rhodes, page 53 ante. "But, when the state courts in no case can take cognizance of the offence charged, and when the functionary acts under the laws of the United States, subject to the control of their high tribunals, all pretence of state jurisdiction seems to vanish."

A. D. 1819. Re Wright, page 54 ante. "This writ from a state court is in effect to defeat the constitution and law of the United States. The state court says, he shall not remove him. The writ has been issued in violation of the constitution of the UnitedStates, and should be quashed."

A. D. 1839. State v. McBride, pages 54-5 ante. "The jurisdiction of the courts of the United States is exclusive in all cases arising under the constitution and laws of the United States," tec.

"The jurisdiction of the courts of the United States extends to all cases arising under the laws of congress."

"The judicial power is commensurate with the legislative power and cannot extend beyond it, because such excess would be inconsistent with its nature."

"Let the federal and state governments be restrained strictly from encroaching on each other, and both will go forward affording adequate relief within their proper spheres, extending and perpetuating the blessings of order and good government to the whole people through all time." By six judges of the supreme court of South Carolina.

A. D. 1850. Norris v. Newton, pages 55-6 ante. This decision is cited in the court below in support of the decision, which we ask to reverse. We ask the closest examination of the report (5 McLean 93).

We say the case is strongly in our favor, and strongly against the defendant in error.

Short extracts mar the force and fail to present the strength of the reasoning on which the decision is based, but among other matter it is held, that, "the return made by plaintiff, being clearly within the provisions of the constitution of the United States, the state judge could exercise no further jurisdiction in the case. Every step subsequently taken, was against the law."

A. D. 1851. By Justice Nelson, page 56 ante. "When the prisoner is held under a law of the United States, it is the duty of the officer not to give him up, or allow him to pass from his hands, in any stage of the proceedings."

A. D 1852. Moore v. People, page 56 ante. "Any state law, which postpones the right of the owner to the immediate possession of the slave is void." We claim the principle of this decision applies as well to fugitives from justice as to slaves, and to the decisions of state courts as to legislative enactments.

A. D. 1851. Re Sims, 56 to 59 ante. This great decision by the supreme court of Massachusetts, is of surpassing interest. The slavery agitation was swelling and boiling throughout tne land. Congress was endeavoring to give additional aid to the slave states, for the execution of the provision of the federal constitution, requiring the return of fugitives from labor. The legislatures of some of the anti-slavery states were passing laws to defeat the attempts of congress, and the friction between the state and national governments was becoming more severe and distressing.

Yet say the court, "the evils existing before the adoption of the constitution, indicated the necessity of a more perfect union, which could only be done by the states renouncing a portion of their powers of sovereignty, the right of war and peace, and of exercising absolute control over all persons and things within their respective territories."

"The theory of the general government is that these subjects in their full extent and entire details being placed under the jurisdiction of the general government, are necessarily withdrawn from the jurisdiction of the state, and the jurisdiction of the general government therefore becomes exclusive. And this is necessary to prevent constant collision and interference; and it is obvious that it must be so, because two distinct governments cannot exercise the same power, at the same time, on the same subject matter. This is not left to mere implication. It is expressly declared, in art. 1, § 8, that congress shall have power to make all laws which shall be necessary and proper, for carrying into execution all the powers vested by the constitution in the government of the United States, or in any department or officer thereof. * *

"The act of 1793 was passed at the second congress, so soon after the adoption of the constitution, that many of the members may be well presumed to have been members of the convention, and all of them to have been intimately conversant with the great principles of the constitution, and with the views, intentions, and purposes of its framers. This species of contemporaneous construction has ever been

regarded as of great weight and importance, and is entitled to the highest respect. It bears with a great weight of authority upon two points; first, as to the power and duty of congress to pass laws to secure and carry into effect a right confirmed by the constitution of the United States; and secondly, as to the fitness of the provisions of law thereby adopted, and their adaptation to the proper and practical assertion of the right secured by the constitution."

We would compare this great decision of the Massachusetts court with its antithesis, the Manchester decision of the supreme court of California.

The Massachusetts court did not disclaim the power "to release a prisoner held under process from a court of the United States, or a soldier or sailor held by a federal officer," but it refused to release Sims because he was held under color of authority under the constitution and laws of the United States.

The Massachusetts court thought that the second congress (A. D. 1793) was conversant with the great principles of the constitution, and understood the power and duty of congress to secure and effectuate a right confirmed by the constitution and the fitness and adaptation of the legislation of congress passed for such purpose.

The California court took a different view of these questions, and furnished some of its "judicial comity" to cure the ailments which its scrutiny discovered in the act of congress of 1793, of which the Massachusetts court had spoken so respectfully.

The California court set a watch on the executive in the execution of his duties under the federal constitution and act of congress, which has not yet been abandoned, and which seems to have led that court to hold in the subsequent cases of Romaine, Cubreth and Rosenblat, that the duty of surrender devolved on the state instead of the governor, on whom congress had vested the power and devolved the duty.

A. D. 1853. Re Jenkins, page 60, ante, "That imprisonment is unlawful, however formal it may be, that affects to punish an act enjoined or justified by the supreme law of the land." If this be true, how can we be held culpable for not producing Bayley? We were acting strictly within the constitution and laws of congress, as the superior court, both by the petition of Bayley and our return to the writ, well knew. We urge that the supreme court of California was required by the strongest obligations of duty to have liberated us on the facts shown by the return of the defendant in error, the sheriff of San Francisco.

A. D. 1856. Re Robinson, page 60, ante. "When the fact is made known to the state judge that the prisoner is held under a law of the United States his jurisdiction ceases, and all subsequent proceedings by him are void."

A. D. 1856. Re Sifford, pages 60-3, ante. "A state judge has no jurisdiction to issue a writ of habeas corpus for a prisoner in custody of an officer of the United States, if the fact of such custody is known to him before issuing the writ, and upon the return of the writ, if it appears that the prisoner is in custody under the authority of the United States the jurisdiction of the judge is at an end, and all further proceedings by him are void."

A. D. 1858. Ableman v. Booth, pages 63-5, ante. No extract can do justice to this great decision. It is the first case in the supreme court of the United States which vindicated the principle for which we are contending. We ask an examination of the report, 21 Howard, 506. The court holds that "a state court may issue the writ, provided it does not appear when the application is made that the person is in custody under the authority of the United States."

"After the return is made and the state court judicially apprized that the party is in custody under the authority of the United States, they can proceed no further. It is the duty of the person holding him * * imperatively to obey the process of the United States, to hold the prisoner in custody under it, and to refuse obedience to the mandate or process of any other government, and not to take the prisoner nor suffer him to be taken before a state court," etc.

"No state judge or court, after they are judicially informed that the prisoner is held under the authority of the United States, has any right to interfere with him, or to require him to be brought before them, and if the authority of a state, in the form of judicial process or otherwise, should attempt to control the * * agent of the United States in respect to the custody of his prisoner, it would be his duty to resist it and call to his aid any force that might be necessary to maintain the authority of the law against illegal interference. * * Any attempt to enforce the judicial process of the state against the custodian of a federal prisoner is nothing less than lawless violence."

This great decision, like the rock upon the shore, marks the highest effort of the wave of state judicial power which swelled and rolled against it, and then broke and receded to its proper level.

A. D. 1861. Re Kelly, page 65-6, ante, is a tribute of respect by a confederate state court to the great decision of Ableman v. Booth, which we have last cited.

A. D. 1861. Re McDonald, page 66, ante. "The United States supreme court has solemnly decided that the state courts have no jurisdiction whatsoever where the confinement is under the authority of the United States."

A. D. 1862. State v. Zulich, page 67, ante. "The federal tribunals having complete, if not exclusive, jurisdiction by the writ of habeas corpus, it would be no abridgement of the right of the citizen to turn him over to the judicial power of the United States."

A. D. 1863. Re Spangler, page 67, ante. "The constitution was formed mainly to secure peace and harmony at home; it was necessary that many of the rights of sovereignty which the states possessed should be ceded to the general government, and that in the sphere of action assigned to it, it should be supreme and strong enough to execute its laws by its own tribunals without interruption from a state or state authorities."

"The territory of a state is common to both governments. The territorial jurisdiction of both governments, therefore, so far as it respects the state, is the same. But is the judicial jurisdiction incident to the writ of habeas corpus the same? We think not. Otherwise the powers of the federal and state courts, as it regards

this writ, are identical; and if they have a common concurrent jurisdiction, the power given to either government by its constitution, to suspend the writ, for all practical purposes is a nullity, as neither can suspend the writ of the other, and as the only effect of a suspension by one would be the same as that of abolishing the jurisdiction of one of two writs having a common concurrent jurisdiction, viz. to drive the suitors of both courts into the one whose jurisdiction was left impaired. Besides if both governments have a common jurisdiction in the use of this writ, we have two independent governments, neither responsible to the other, acting upon the same subject matter. One may imprison, the other may release from such imprisonment, for the former to renew the imprisonment, and the latter again set free, until the stronger overpowers the weaker. * *

"The state court cannot inquire into the validity of the authority [of the United States] for this would be taking jurisdiction of the whole question. * * Up to the point of imprisonment by the federal government the state habeas corpus has jurisdiction. It then ceases, and the jurisdiction of the federal habeas corpus begins. In all cases of imprisonment, other than by the federal government, the state writ of habeas corpus has exclusive jurisdiction. In all cases of imprisonment by or under authority of the federal government, the federal writ of habeas corpus has exclusive jurisdiction."

A. D. 1863. Re Shirk, pages 70-1 ante. The respondent refused to produce the prisoner, because he held the prisoner under the authority of the United States. Motion for an attachment. *Held.* "The state court can proceed no further. We cannot disregard the law as settled by the highest court of the land in Ableman v. Booth."

A. D. 1867. Re Farrand, pages 71-2 ante. The respondent refused to obey the writ of Mayor Buchanan, and for so refusing, he was confined. *Held* "It is the duty of a person, who holds a prisoner under authority of the United States, to resist any order of the state court discharging him."

A. D. 1867. Re Roberts, pages 72-3 ante. Roberts killed a man, whom he was attempting to arrest for violating the revenue laws of the United States. He was prosecuted for the killing in the state courts. *Held.* "The state courts cannot punish an act done in the execution of the laws of the United States."

A. D 1869. Re Hill, page 73 ante. "It appears the petitioner is in custody under the authority of the United States, the state court can proceed no further. Prisoner remanded."

A. D. 1871. Re Neill, pages 73-4 ante. "General Niell was not bound to produce the body of Casey under the state writ. Niell held Casey under the authority of the United States, and the state court had no jurisdiction to issue the writ to General Niell or to imprison him for not obeying the same."

A. D. 1871. Re Tarble, pages 74-6 ante. "All that is meant by the language used is, that the state judge or state court should proceed no further when it appears, from the application of the party, or the return made, that the prisoner is held by an officer of the United States under what, in truth, purports to be authority of the United

States; that is, an authority, the validity of which is to be determined by the constitution and laws of the United States. If a party thus held be illegally imprisoned it is for the courts or judicial officers of the United States, and those courts or officers alone, to grant him release."

We ask attention to the points in which our case is similar to, and different from, this great leading case.

The petition for the habeas corpus for Tarble showed on its face that Tarble was held under color of federal authority.

The petition of Bayley shows on its face that he is held by Robb under federal law.

The commissioner of Dane county issued his writ for Tarble, although the petition showed that the state court had no jurisdiction because Tarble was held under federal authority. The superior court of San Francisco issued its writ for Bayley, although the court knew from Bayley's petition that Robb held Bayley under federal authority.

Lieutenant Stone protested against the jurisdiction of the state court in the Tarble case. The plaintiff Robb protested against the jurisdiction of the state court in this case.

The state court in each case disregarded the protest, and in each case the supreme state court sustained the action of the lower court.

In the Tarble case the supreme court of Wisconsin disregarded the decision of the supreme court of the United States in Ableman v. Booth.

In the present case the supreme court of California has not followed the Tarble decision of the supreme court of the United States.

The supreme court in Wisconsin directed its clerk not to return the writ of error issued by the United States supreme court. The supreme court of California refused to re-examine or modify its decision after its attention is called to the contrary and controlling decree of the circuit court of the United States.

The Tarble case was reversed by the supreme court of the United States. We believe this case will in like manner be reversed.

Lieutenant Stone rendered his protest ineffectual by producing Tarble. We rendered our protest effectual by refusing to produce Bayley.

Lieutenant Stone escaped imprisonment, but he lost his prisoner Tarble. We suffered imprisonment, but we held our prisoner Bayley.

The state courts of Wisconsin, in the plenitude of their power, disregarded the false imprisonment of Tarble by Lieutenant Stone. The state courts of California, in the paucity of their power, are prosecuting the plaintiff W. L. Robb.

A. D. 1879. Re Leary, pages 76-8 ante. Leary was held in New York on an extradition mandate issued by the governor of Massachusetts. He had his habeas corpus in the state court and an appeal was taken, pending which he remained in custody.

He petitioned the district court of the United States for a writ.

It was objected that he was in the custody of the state court, and that the United States court should not proceed. The objection was overruled because "such facts do not prevent the court of the United

States from proceeding with the cause." It was *held* "the constitution which, for national purposes, welded the several states into a single country, brought this matter and obligation within the purview and jurisdiction of federal authority."

A. D. 1884. Re Robb, pages 79–91 ante. This is the case of the plaintiff in error herein. He sought by all the means in his power to avert and avoid a forcible collision, between the officers of the state and federal judiciary.

He patiently waited, from the 21st day of November 1883 until the 10th day of January 1884, for the decision, of the supreme court of California, on his application to be discharged from the custody of the sheriff of San Francisco, who is the defendant herein.

Having been remanded by said supreme court, he petitioned the circuit court of the United States for his liberty, and on the 19th day of January 1884, was discharged from custody by its order. He petitioned the supreme court for a rehearing, and called its attention to the decision of the circuit court.

The supreme court denied his petition for rehearing, and refused to recede from the position it had taken. The decision of the circuit court is directly opposed to the decision of the supreme court of California. One or the other must be wrong. The plaintiff claims, that the circuit court has followed, and the supreme court of California disregarded, the decisions of the supreme court of the United States in the Booth and Tarble cases, and that the decision of the circuit court is correct. If this be true it follows, that the supreme court of California erred in its decision, and that it ought to be reversed.

REVIEW OF CALIFORNIA SUPREME COURT AUTHORITIES.

The supreme court of California, cites four cases in its opinion; they are to be found in our list of authorities, and we assert upon examination, that neither of these cases sustain the opinion under review. The cases are:

A. D. 1846. Schlemn, 4 Harr. 571.
1850. Norris v. Newton, 5 McLean, 93.
1874. People v. Brady, 56 N. Y. 152.
1881. People v. Donohue, 84 N. Y. 442.

In none of these cases was the jurisdiction of the state court questioned, or its power to order the production of the prisoner denied, affirmed or decided.

In Schlemn's case the governor's mandate was held conclusive, and it was also remarked that the fourth section of the habeas corpus act of Delaware excepted fugitives from justice from the privilege of the writ. There is no doubt that this exception was made to prevent a conflict of jurisdiction between the federal and state judiciary, and because the jurisdiction of the subject is exclusively vested in the federal courts.

Norris v. Newton we cite as follows: "We must stand by the law. We have sworn to maintain it. * * Our duty is found in the constitution of the union as construed by the supreme court."

"The fugitives from *labor* [justice] we are bound by the highest obligations to deliver up on *claim of the master* [demand of the execu-

tive] being made; and there is no state power which can release the *slave* [fugitive from justice] from the legal custody of *his master* [the agent authorized to receive him]."

People v. Brady. In this case the relator, Lawrence was discharged by the court of appeals, the counsel for the people conceding that it was competent for the court to go behind the governor's extradition mandate and examine the papers. We remark that a concession of counsel, by which the court is misled, is not a decision.

The Donohue case is cited on page 51, ante, and has no bearing on the jurisdiction of the court or the production of the body.

REVIEW OF DEFENDANT'S BRIEF.

We claim that the argument and authorities urged by the defendant in error in his brief are not inconsistent with the correctness of our contention. In the Schlemn case there was no issue about the production of the body, and the remark of the court about the production of the body was harmless in that case and inapplicable to this.

The definition of Bouvier and all that is found in Hurd on habeas corpus, 239, 240, and secs. 1481-4 of penal code of California, we consider inapplicable to this case.

We say the production of the body is a consequence and concommitant of jurisdiction, and that where there is no jurisdiction there is no need of producing and no power to compel the production of the body. We refused to produce the body because the decisions of the federal court which we have cited, and particularly the Booth and Tarble cases, say that is the proper course, and because that was the only way in which the interests of the United States could be saved from the attack of the state courts.

We deny emphatically the jurisdiction of the state courts to issue, or hear, or determine the writ in cases where the prisoner is held in custody under federal authority.

The constitution of California of 1879 provides that "the constitution of the United States is the supreme law of the land." Art. 1, sec. 3, and "the superior courts * * shall have power to issue writs of habeas corpus for a person in actual custody in their respective counties." Art. 6, sec. 5.

We contend that the grant of power is subject to the limitation that the state shall not intrude with her judicial process into the domain of federal power. We do not think that the state could send its judicial process into the sphere of federal power if the clause we have quoted was not inserted in the constitution. Perhaps it was inserted, because the state had rejected the 14th and 15th articles of the constitution, and it was intended to settle beyond all doubt the acceptance of those articles by the state. But we claim that it walks by the side of every provision of the constitution, and forbids any encroachment on the federal power.

Our learned adversary contends for the concurrent jurisdiction of the state courts with the courts of the United States in many matters arising under the laws of the United States, and cites Hurd on habeas corpus, 154–156, et seq. We reply that it is a matter of history that

such jurisdiction was claimed by many of the state courts prior to the case of Ableman v. Booth, but we find no evidence that it was ever admitted by the federal courts. We claim that the Booth and Tarble cases are conclusive of the whole question, and that whatever the state courts may have formerly held, if contrary to these great cases, is no longer law, because it is contrary to the supreme law of the land.

If the Booth and Tarble cases do not apply to our contention, we do not understand them. We claim that they fully justify us in not producing the body.

The petition of Bayley and the return of Robb both show that the governor of California had received a demand from the governor of Oregon for the extradition of Bayley, under the constitution and laws of the United States. We think it clearly appears that Robb held Bayley under federal authority.

The defendant in error claims that "whether under authority of the United States or not, the cause of Bayley's imprisonment could be inquired into by a state court." We thank counsel for the clearness of his assertion, and we say that, under the Booth and Tarble decisions, his proposition is plainly incorrect and erroneous.

The following opinion of Chancellor Kent, published in A. D. 1826, fully sustains the legal principles so clearly stated, A. D. 1884, in the circuit court decision, re Robb, pages 79–92, ante:

"The provision in the constitution of the United States is not, however, to be regarded as a null and void provision, or resting on the mere will and pleasure of the state authorities. It is a substantive and essential grant of power by the people of the United States to the government of the United States, and it partakes of a judicial character, and is fitly and constitutionally of judicial cognizance. The judicial power of the United States extends to all cases in law and equity arising under the constitution, and the courts and judges of the United States within the state to which the fugitive has fled are the fittest tribunals to be clothed with the exercise of this power, so that the claimant might, on due application with the requisite proof, cause the fugitive to be arrested and removed or surrendered by the marshal of the district, under regular judicial process by habeas corpus. To such a course of proceeding, and to such a source of power, I should rather apprehend the act of congress ought to have applied, and given facility and direction. Such a course of proceeding would be efficient, and more safe for the fugitive, and more consistent with the orderly and customary administration of justice. It concerns the common interest and intercourse among the several states, and is a branch of international jurisprudence." (By Chancellor Kent, 2 Kent's Com. 32.)

THE ASSIGNMENT OF ERRORS EXAMINED.

The supreme court of California was not required to decide whether Robb had sufficient authority to hold Bayley, but we claim that it was incumbent on it to decide whether the superior court had power to compel Robb to produce Bayley. We say that the answer to this

question depended on the fact whether or not the superior court knew that Robb held Bayley under the authority of the United States.

In this case there is no dispute as to the facts—the sworn petition of Bayley and sworn answer of Robb were in perfect accord, and of the same sound.

The question then presented was, whether the superior court should proceed. Not how far it should proceed, but whether it could proceed at all. We say it was not proper for the superior court in the Bayley habeas corpus, or the supreme court in the Robb habeas corpus, to inquire into the legality of the detention of Bayley by Robb, if it appeared, as we claim that it did, that Robb held Bayley under the authority of the United States; to do so would be trying in a state court a habeas corpus which should be heard in a federal court only.

The production of Bayley by Robb is merely a test of the jurisdiction of the superior court, and the question of jurisdiction is the vital question, the very essence of this case. Most gladly would Robb have produced Bayley if the court had promised not to take him from his custody; but this promise the court could not give, or keep if given; nor could Robb ask, nor did he ask it.

Plaintiff claims that this promise is really given by the constitution and laws of congress and the decisions of the supreme court of the United States; but he knows the courts of the state of California do not so understand the law.

The state courts of California had deprived Oregon of her rights under the national constitution in A. D. 1858, in the discharge of Edwards and Spanier, page 24, ante, and in 1866 in the discharge of Donohue, page 27, ante, and this plaintiff well knew that if he produced Bayley the court would proceed to hear and determine on the merits of a controversy which should be heard and determined only in the federal courts.

The plaintiff was not unmindful of the magnitude of the interests which were cast upon him by the exigency of his commission, and he took the risk and accepted the consequences of attempting to maintain the supremacy of the laws of the United States. His duty to the state of Oregon required him to do so, and his loyalty to the national government forbade him to do otherwise.

The plaintiff was forced to elect whether he would waive the rights of the United States, and after his prisoner, Bayley, was torn from his grasp by a state court, pursue the barren (and to him and his cause ineffectual) remedy of a writ of error to the supreme court of the United States, or assert the rights of the United States in refusing to produce Bayley, and thus raise the question of the jurisdiction of the state court. If the court was not going to pursue the inquiry, the production of the body was useless; if it was, we say there was an absence of jurisdiction which devolved on us the duty of effectual remonstrance.

Had Robb produced Bayley and the court ordered Bayley to be discharged. Robb could not effectually resist the discharge, because the sheriff would enforce the discharge and the court bend all its

power to vindicate its authority by arresting and punishing Robb. If we are correct as to the lack of jurisdiction it follows that the court was not obliged to proceed with the hearing or to examine the return, further than to see that the detention was under color of federal authority; and as to this there was no dispute, and could be none, as both parties affirmed the same state of facts.

It is true that the prisoner may traverse the return, if the court has jurisdiction, but not otherwise. But this rule has no application to the case at bar.

In our case the facts were set out in the petition in the same manner, substantially, as in the return. There was an absence, or want of jurisdiction, in the state court apparent on the face of the petition. The case was cognizable only in the federal court, and when the prisoner did not contend or assert the return to be untrue, but on the contrary, by his verified petition showed the return to be true, there was a manifest inutility in bringing him into court in order that he might traverse the return.

Marshal Ableman obeyed the state writ and produced Booth. Lieutenant Stone obeyed the state writ and produced Tarble. In both cases the state court usurped jurisdiction to discharge, and did discharge, the prisoners, although they were held under the authority of the United States.

We can discover no difference between the principles of law applicable to these cases and our own.

We are confident that if Ableman had refused to produce Booth, and Stone had refused to produce Tarble, the courts of the United States would have sustained them in their fealty to federal authority; and our confidence in the ability and willingness of the federal power to give us relief and protection has inspired us with courage to assert the supremacy of the national law.

We may say, in the unanswerable language of Chief Justice Taney, "There can be no such thing as judicial authority unless it is conferred by a government or sovereignty. If the courts possess the jurisdiction they claim, they must derive it either from the United States or the state. It has not been conferred on them by the United States, and it is equally clear it was not in the power of the state to confer it." Ableman v. Booth, page 63, ante.

CONCLUSION.

We think we have traced the origin of this claim of jurisdiction to a misapprehension by the supreme court of New York in 1832, in the case of John L. Clark. The surveys which define, and the monuments which perpetuate, the limits between the federal and state power, the benefit of which we now enjoy, had not then been made or located.

In the subsequent cases of Manchester, A. D. 1855, and Briscoe, A. D. 1876, we discover the same misleading factor, namely, the claim that the state courts are not denied jurisdiction in this class of cases.

We have shown: *a*, That interstate extradition passed to the national government under the federal constitution; *b*, That the judicial power to deal with fugitives from justice flowed through the constitu-